89-1796

No. ___

In The

Supreme Court of the United States

October Term, 1989

JOHN HASSO, ELISSA N.V., RUMBA, N.V., PACIFIC MIDLAND N.V., KONDOLAND CORP. and GRAPE CAPITAL CORP.,

Petitioners,

v.

CHARLES DUGGAN,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court recently granted certiorari in *Pacific Mutual Life Insurance Co. v. Haslip* to address due process standards applicable to punitive damages awards. That case raises, among other questions, whether a jury's unbridled discretion to award punitive damages denies due process, and whether constitutional protections available to criminal defendants apply to the imposition of punitive damages.

This case also raises questions involving the application of the Due Process Clause to an award of punitive damages; however, this case raises several critical due process issues not raised by *Pacific Mutual*: the scope of evidence admissible on the claim for punitive damages, and the proportionality of punitive damages to a defendant's net worth. The question raised here, when juxtaposed with those raised in *Pacific Mutual*, offer the Court the seasonable opportunity to address the full panoply of constitutional issues raised by procedures typically employed in civil punitive damages cases. Accordingly, the questions presented are:

1. Does an award of punitive damages violate the Due Process Clause, when, in a separate damages trial by a jury different from that which determined liability, the defendant is not permitted to introduce any of the mitigating evidence admitted in the first trial on the issue of liability? Stated otherwise, what mitigating evidence consistent with due process standards *must* be admitted in order for a jury to award punitive damages?[1]

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[1] The trial court stated initially that it could not "artificially paint Mr. Hasso into a corner . . . and allow this case to be retried so that he's got both hands tied behind his back" [RT 853:17-22], but proceeded to do just that.

QUESTIONS PRESENTED – Continued

2. Does an award of punitive damages violate the Due Process Clause, when the jury is permitted to award punitive damages against the defendant for exercising constitutional and statutory rights of appeal (resulting in a partially successful appeal of the judgment of liability and damages) and for taking legal steps to prevent execution on the judgment pending the appeal? Stated otherwise, what evidence does the Due Process Clause *preclude* a jury from hearing when assessing punitive damages?

3. Is an award of punitive damages excessive and disproportionate, in violation of the Due Process Clause, when it bears no reasonable relation to either the actual damages or the defendant's net worth and cannot be cured by available post-trial and appellate review?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioners state that Elissa N.V., Pacific Midland N.V., and Rumba N.V. are Netherlands Antilles corporations. Kondoland Corp. is a Colorado corporation and Grape Capital Corp. is a Nevada corporation. They have no parent companies, non-wholly owned subsidiaries or affiliates.

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PETITION FOR WRIT OF CERTIORARI

John Hasso, Elissa N.V., Pacific Midland N.V., Rumba N.V., Kondoland Corp. and Grape Capital Corp. ("Hasso")[2] respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District, Division Four in this case.

OPINIONS BELOW

The opinion of the Napa County Superior Court is unreported. [App., *infra*, A1-A8.] The opinion of the California Court of Appeal is also unreported. [App., *infra*, B1-B35.]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

The judgment of the California Court of Appeal was entered on November 30, 1989. A timely petition for rehearing was denied on December 28, 1989 [App., *infra*, C1], and a petition for review in the California Supreme Court was denied on February 14, 1990 [App., *infra*, D1].

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[2] Elissa N.V., Pacific Midland N.V., and Rumba N.V. were sued in the original complaint and were found to be alter egos of John Hasso at the first trial of this matter. Kondoland Corp. and Grape Capital Corp. were determined to be alter egos of John Hasso at the second trial in this matter and were added as judgment debtors on August 30, 1988. John Hasso is thus the only real party in interest.

On March 23, 1990, the Court of Appeal granted Hasso's motion for stay of issuance of remittitur [App., *infra*, E1]. The California Supreme Court subsequently denied respondent's petition for review of the stay order [App., *infra*, F1].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, of the United States Constitution provides in relevant part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner John Hasso, an individual, was assessed with a punitive damage award of $2 million, an amount which is almost 17% of his net worth[3] and which is more than four times the compensatory damage award of $483,584. The damages were assessed based on a finding of fraud in connection with a real estate investment agreement. The punitive damages were awarded by a

[3] The court of appeal found that the evidence supported a net worth of $12 million. Mr. Hasso in fact disputed the evidence of net worth and the court's placing on him the burden of proof as to net worth. [App., *infra*, B31-35.]

different jury than the one that decided liability, and were awarded in a separate damages trial that took place six years after the liability trial.

In the damages trial the jury's only information regarding the circumstances of the fraud for which punitive damages would be assessed was a stripped down and one-sided version of the statement of facts from the prior opinion of the Court of Appeal. The version of that statement read to the jury was devoid of any of the mitigating evidence, acknowledged by the court of appeal, which tended to cast Mr. Hasso in a sympathetic light or excuse his conduct. Hasso was not permitted to introduce evidence demonstrating that he had not acted reprehensibly and, indeed, evidence that he had at times acted generously towards the plaintiff was excluded as well.[4]

The jury was, in addition, permitted to punish Hasso for legal action he took in furtherance of his rights of appeal after the first trial, an appeal which succeeded in part. He was not apprised that he was to be tried and

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[4] Under California law, the jury is required to consider three factors in determining an amount of punitive damages: (1) the amount of actual harm to the plaintiff; (2) the reprehensibility of defendant's conduct; and (3) the net worth of the defendant. *Neal v. Farmers Insurance Exchange*, 21 Cal.3d 910, 928, 148 Cal.Rptr. 389, 399 (1978). Most states require the jury assessing punitive damages to consider these three factors. Owen, *Problems In Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 9 (1982). California, like other states which employ these criteria, does not provide any further explanation of these factors to guide the jury's discretion.

punished for conduct taken to protect his right to appeal. Nonetheless, both the trial and appellate courts justified the excessive punitive damages award in part based on Hasso's efforts to stay execution of the judgment pending the ultimately successful appeal of the first trial.

A. The Real Estate Investment Agreement.

Hasso is an Iraqi-born businessman who emigrated to Napa County in the early 1970's. There he met respondent Charles Duggan, an attorney, and they eventually entered into an oral agreement by which Duggan would locate investment properties, negotiate their purchase and maintain and develop the properties, while Hasso would provide the funds for these efforts. Hasso was to receive 85%, and Duggan 15%, of the partnership profits.

The parties agreed to draft a formal partnership agreement. A Memorandum of Understanding was drafted by George Humphreys, an attorney who, although he had formed a law partnership with Duggan, told Hasso that he was representing Hasso's interests in connection with the agreement. Duggan later presented Hasso with a more complete partnership agreement drafted by Humphreys. Hasso, though, declined to sign it because the terms varied radically from the Memorandum and from his understanding of the arrangement. Hasso then terminated the relationship with Duggan.

Duggan filed suit for compensatory and punitive damages on December 21, 1978. He alleged claims for fraud, for dissolution and accounting of the partnership, and for quantum meruit. Hasso counterclaimed for fraud.

B. The Liability Trial.

The action was tried in March 1982. Duggan contended that Hasso had promised Duggan a percentage of the profits without any intent to perform. Hasso claimed that Duggan fraudulently induced him to enter the agreement.

The jury found for Duggan on his fraud claim and against Hasso on his cross-claim. They awarded Duggan $541,359 in compensatory damages and $1,101,549.75 in punitive damages. At the end of the first trial, the court stated that it believed the evidence of fraud was "thin."[5] On the motion for new trial, the court stated it did not agree with the jury's verdict; it determined, however, that there was sufficient evidence to support the jury's verdict.

C. The First Appeal.

Hasso timely filed a notice of appeal. The California Court of Appeal, First Appellate District, Division Four, entered its decision on September 29, 1986. The court upheld the jury's verdict as to liability, but found that the compensatory damages had been calculated incorrectly. It therefore reversed both the compensatory and punitive

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[5] The trial court ruled on the equitable claims that no partnership had been formed, in part because the parties had never agreed on crucial terms of the agreement, and in part because the Memorandum of Understanding had been tainted by Humphreys' conflict of interest. It nonetheless awarded Duggan $156,435 as quantum meruit. Duggan opted to have judgment entered on the jury's verdict.

damages awards with directions to retry the case as to damages only.

Justice Poche dissented from the ruling, finding "scant" evidence of fraud by Hasso and significant evidence of less than trustworthy conduct by Duggan.[6] Thus, both the trial judge and at least one court of appeal justice reviewing the record found barely enough evidence to warrant the fraud verdict against Hasso and found substantial evidence of improper conduct on Duggan's part in mitigation of the finding of fraud.

D. The Efforts to Stay Execution on the Judgment.

Hasso took steps after the first trial to stay execution of the judgment pending the appeal. These steps included motions in the trial court and court of appeal for orders staying execution of the judgment pending the appeal, and an offer to deposit the deeds to the jointly acquired properties into court in lieu of a bond. Hasso also filed a petition in bankruptcy, which was later dismissed.

In February 1983, Hasso's mother-in-law deposited $2.5 million in cash into court in lieu of bond, which stayed execution of the judgment pending appeal. After the court of appeal reversed the award of compensatory

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[6] Hasso argued unsuccessfully that Duggan's fraud claim was barred by California Business & Professions Code section 10136 because Duggan acted as a real estate broker without a license. Justice Poche in dissent noted:

> . . . there is scant evidence that Hasso was familiar with licensing law, sought out Duggan or had any . . . intention [to defraud him]. [CT 433-34.]

and punitive damages, a motion was made by Hasso's mother-in-law to the trial court to release the cash deposit. The trial court denied the motion.

E. The Damages Trial.

At the outset of the damages trial, the court ruled that it would present a statement of facts to the jury, taken from the court of appeal opinion, which described briefly the factual findings of the first trial court and court of appeal and explained the current posture of the case. That statement, however, was stripped of any facts which the trial court and court of appeal had found in Hasso's favor and which tended to mitigate or excuse Hasso's conduct in the transaction.[7]

Plaintiff argued throughout the damages trial that Hasso should not be allowed to present *any* evidence concerning the circumstances of the fraud to the jury that was to decide how much punishment Hasso deserved. Plaintiff argued that Hasso could not even suggest that in spite of the finding of fraud he was otherwise a good man. [RT 106:12-16.] The court ultimately ruled that Hasso could not even testify to his remorse. [RT 1728a 6:7-1728a 7:10.] While acknowledging that Hasso

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[7] Hasso argued that he should be allowed to introduce mitigating evidence: (1) of the role of Humphreys in the parties' attempt to formalize the partnership agreement; (2) that Duggan supplied the terms of the draft agreement; (3) that Hasso had loaned Duggan more than $50,000, interest-free, during the course of their relationship; and (4) that Duggan had helped set up the offshore corporations in which title to the properties was held.

was entitled to defend himself against the punitive damage award,[8] the court ultimately did tie Hasso's hands by ruling that Hasso would not be allowed to introduce *any* evidence relating to the fraud itself, even mitigating facts which the trial court and court of appeal had found to be true. [RT 979:2-16.]

The court at the same time stated that the trial would focus only on conduct occurring *after* the first trial – Hasso's efforts to post a bond and stay execution of the judgment pending appeal – even though it was conduct distinct from and irrelevant to the conduct upon which the first jury based its finding of fraud. [RT 989:1-4.] Consequently, the jury heard evidence and argument concerning the length of the litigation, the posting of cash to stay execution of the judgment, the appeal, and the motion to release the cash deposit after the court of appeal reversed the damages awards.

The jury was instructed to consider the three factors set out in *Neal v. Farmers Insurance Exchange* (*see supra*, note 3), in determining an award of punitive damages. [RT 2236a 53:3-11.] As to the element of net worth, however, the jury was instructed that the burden of proof was on Hasso to show that he could not pay a given amount

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[8] The court stated at the beginning of the trial:

> . . . you've got a finding of fraud, a finding of liability. That's true. *But I don't think I can artificially paint Mr. Hasso into a corner in this case and allow this case to be retried so that he's got both hands tied behind his back.* He's sort of got one hand tied behind his back because of the fraud finding. [RT 853:17-22 (emphasis added).]

of punitive damages.[9] The jury then returned a punitive damage verdict against Hasso of $3 million.

F. The Motion for New Trial.

Hasso timely moved for new trial or alternatively for remittitur of the punitive damages award. Hasso argued that the court "violated fundamental due process" in refusing to allow Hasso to introduce evidence of the underlying events and circumstances relating to the fraud. [CT 1109:8-14.]

At oral argument and in a supplemental letter-brief, Hasso argued that the admission of evidence regarding Hasso's post-trial litigation conduct denied him his fundamental right to defend himself. [CT 1339-1354.]

Hasso also argued in his motion for new trial that the punitive damages award was in all events excessive as a matter of law. [CT 1118-1128.] The trial court rejected Hasso's arguments with respect to the scope of the evidence but agreed to grant a new trial unless plaintiff accepted a remittitur of the punitive damages to $2 million. Plaintiff accepted the remittitur.

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[9] The prevailing authority at the time of trial required that the burden of proof on the issue of net worth be placed on defendant. Hasso did not object at the time because it would have been futile. While the second appeal was pending the court of appeal issued an opinion in another case holding that plaintiff bore the burden of proof on net worth. The court of appeal, though, rejected Hasso's futility argument and held Hasso waived the objection. The court went on to say that the error was harmless anyway even though the issue of Hasso's net worth had been hotly contested.

G. The Second Appeal.

Hasso timely filed a notice of appeal, arguing that the trial court's rulings that barred Hasso from introducing evidence on the issue of reprehensibility "effectively deprived defendant of a fair trial on punitive damages." [AOB 41.] Similarly, Hasso stated that admitting the evidence of litigation conduct "violated settled law protecting a litigant's right to defend himself . . . " [AOB 45], citing cases based on "considerations of fundamental fairness and the right to a vigorous defense." [AOB 47.] Hasso further argued that the award was excessive in light of his net worth.

The court of appeal affirmed. It found no error in the exclusion of evidence on the issue of reprehensibility and agreed with the trial court that Hasso could be assessed millions of dollars in punitive damages for uncharged conduct in connection with his attempt to defend himself in the litigation [App., *infra*, B30-31]. The court also rejected Hasso's claim that the punitive damages were excessive in light of the reprehensibility of the conduct, or in light of his net worth.

Hasso petitioned the court of appeal for a rehearing, contending that the trial court's (1) refusal to allow him to introduce evidence on the issue of reprehensibility and (2) admission of evidence of post-trial litigation conduct, violated Hasso's rights under the Due Process Clause. The court of appeal denied the petition without comment. [App., *infra*, C1.]

H. The Petition For Review In The California Supreme Court.

Hasso filed a petition for review in the California Supreme Court, contending that the trial court violated

his rights to a fundamentally fair procedure under the Due Process Clause of the Fourteenth Amendment by: a) refusing to allow him to defend himself on the issue of the reprehensibility of his conduct; and b) insisting he be punished for uncharged post-trial litigation conduct. The Supreme Court denied review.

I. The Due Process Issues Were Raised Below.

The failure to cite explicitly to the Due Process Clause at trial or in the opening appellate brief does not bar this Court's review because the issues were otherwise adequately presented. *See Taylor v. Illinois*, 484 U.S. 400, 407 n.9, 108 S.Ct. 646, 651 n.9 (1988); *Douglas v. Alabama*, 380 U.S. 415, 420-22, 85 S.Ct. 1074, 1078 (1965). The due process issues in this case were sufficiently raised at the trial level and on appeal, and the factual record is complete. The trial court acknowledged that Hasso's objections to the exclusion of evidence on the issue of reprehensibility were grounded in his due process right to defend himself. [RT 853:17-22.] Hasso argued in his motion for new trial and in Appellants' Opening Brief that the exclusion of mitigating evidence "violated fundamental due process," and that the admission of evidence on post-trial litigation conduct "deprived defendant of a fair trial." He further argued in the motion for new trial and on appeal that the punitive damages were excessive and arbitrary given the fundamentally unfair exclusion of mitigating evidence and in the admission of evidence of litigation conduct.

REASONS FOR GRANTING THIS PETITION

This Court's grant of certiorari in *Pacific Mutual Life Insurance Co. v. Haslip*, 553 So.2d 537 (Ala. 1989), *cert. granted*, 110 S.Ct. 1780 (April 2, 1990), is its most recent acknowledgment that arbitrary punitive damages awards raise substantial due process questions. This case presents and fleshes out other specific due process issues so that the Court (if it grants this petition) can now define *pari passu* appropriate due process guidelines for the plethora of civil cases raising punitive damage issues.

In *Pacific Mutual*, the jury awarded $2,500 in compensatory damages but more than $1 million in punitive damages against Pacific Mutual for the fraudulent conduct of its agent. Its petition raises questions regarding whether an award of punitive damages that far exceeds actual damages denies due process, and whether an award of punitive damages based on *respondeat superior* liability is a denial of due process. In addition, Pacific Mutual's petition raises a more general attack on the jury's essentially uncircumscribed discretion to award punitive damages.

This case (while not involving the *respondeat superior* issue) presents equally important questions of admissibility and inadmissibility of evidence to accord a defendant due process rights to notice and a meaningful opportunity to defend. Because this case focuses on the scope of evidence which, consistent with due process, is admissible on the issue of reprehensibility, the Court has a significant opportunity to define specific guidelines on the relationship between a defendant's wrongful conduct and an award of punitive damages.

Moreover, the instant case raises the identical due process issue presented in *Pacific Mutual* respecting punitive damages which are disproportionate to actual damages, and further raises the issue of punitive damages which are disproportionate to the net worth of the defendant. Though juries are typically asked to consider, in addition to reprehensibility, both the actual harm to the plaintiff and defendant's net worth, no other objective guidelines are given to guide the jury in assessing only an amount necessary to punish and deter. This all too frequently results in arbitrary punitive damage awards which are grossly in excess of actual damages (as in both *Pacific Mutual* and this case) and which take a disproportionate share of defendant's net worth (as in the instant case).

I. THE AWARD OF PUNITIVE DAMAGES IN THIS CASE WAS ARBITRARY, IN VIOLATION OF JOHN HASSO'S DUE PROCESS RIGHT TO A MEANINGFUL OPPORTUNITY TO DEFEND, BECAUSE HE WAS PROHIBITED FROM PRESENTING ANY EVIDENCE IN MITIGATION OF HIS CONDUCT.

A. Due Process Requires Fair Procedures Which Will Prevent The Arbitrary Award Of Punitive Damages In Excess Of An Amount Necessary To Punish And Deter.

Prior to *Pacific Mutual*, at least five members of this Court had expressed concern that excessive and arbitrary punitive damages awards may violate due process standards. Most recently in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct.

2909 (1989), Justice Brennan in a concurring opinion joined by Justice Marshall, stated:

> I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties. See *ante*, at 2920.
>
> Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are "grossly excessive," [citation omitted] or "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable" [citations omitted]. I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits.
>
> Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision.

___ U.S. at ___, 109 S.Ct. at 2923 (Brennan, J., concurring).

Justice O'Connor, in a separate opinion in *Browning-Ferris* joined by Justice Stevens, shared Justice Brennan's concerns regarding the due process issues. Justice O'Connor, moreover, was joined by Justice Scalia in a concurring opinion in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645 (1988), which states:

> Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.

486 U.S. at 87, 108 S.Ct. at 1655 (O'Connor, J., concurring in part and concurring in the judgment).[10]

Decisions of this Court recognize that due process standards applicable to determining both how and how much punitive damages will be awarded must be consistent with Constitutional constraints on the imposition of criminal penalties. Several Supreme Court cases establish a test for determining when nominally civil cases are essentially penal in nature. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554 (1963). Most recently, in *United States v. Halper*, ___ U.S. ___, 109 S.Ct. 1892 (1989), the Court considered "whether and under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause." ___ U.S. at ___, 109 S.Ct. at 1901. The Court concluded:

> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. . . . *Simply put, a civil as well as a criminal*

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[10] *See also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-829, 106 S.Ct. 1580, 1589 (1986) (lack of standards governing punitive damages awards raises important Due Process Clause issues which must be resolved).

> *sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.*

___ U.S. at ___, 109 S.Ct. at 1901-02 (emphasis added). *See also Trop v. Dulles*, 356 U.S. 86, 96, 78 S.Ct. 590, 595 (1958); *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 551, 63 S.Ct. 379, 388 (1943).

"Punitive damages are awarded not to compensate for injury but, rather, 'to punish reprehensible conduct and to deter its future occurrence.' *Gertz v. Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 3012 (1974)." *Bankers Life*, 486 U.S. at 87, 108 S.Ct. at 1655 (O'Connor, J., concurring in part and concurring in the judgment). Supreme Court precedent suggests, therefore, that because punitive damages are penal in nature, certain Fourth, Fifth, Sixth and Eighth Amendment protections should apply directly in the appropriate case and should at least heighten the scrutiny given to punitive damages procedures under the Due Process Clause.

Several criminal law decisions, for example, establish the rule that a punishment cannot be so excessive as to be disproportionate to the severity of the offense. *Solem v. Helm*, 463 U.S 277, 290, 103 S.Ct. 3001, 3009 (1983); *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925 (1976). In *Solem*, the Court set out several objective criteria to consider in weighing whether a particular punishment is disproportionate to the offense for purposes of the Cruel and Unusual Punishment Clause of the Eighth Amendment. 463 U.S. at 292, 103 S.Ct. at 3011. Regardless of

whether it applies directly,[11] the proportionality analysis under the Eighth Amendment should apply through the Due Process Clause to civil remedies which are penal in nature.

Punitive damages, like criminal penalties, are meant to punish and deter. Due process requires that fair procedures be employed in assessing punitive damages to prevent awards that are arbitrary in light of the purpose for punitive damages. Because punitive damages and criminal penalties serve the same purpose, this Court should look to analyses and definitions of criminal law protections in undertaking the due process analysis of punitive damages procedures.

B. The Due Process Right To Present A Meaningful Defense Requires That A Defendant Facing A Claim For Punitive Damages Be Allowed To Present Evidence In Mitigation Of His Conduct.

The due process right to be heard requires a "meaningful" hearing. *Bell v. Burson*, 402 U.S. 535, 541, 91 S.Ct. 1586, 1591 (1971). A "hearing which excludes consideration of an element essential to the decision . . . does not meet this standard." 402 U.S. at 542, 91 S.Ct. at 1591.

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[11] While the Excessive Fines Clause of the Eighth Amendment does not apply to civil actions between private parties, *Browning-Ferris Industries v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989), the Court has left open the question whether the Cruel and Unusual Punishment Clause applies to actions between private parties. *Browning-Ferris*, ___ U.S. at ___, 109 S.Ct. at 2914 n.3.

The central element in determining how much civil punishment is necessary and appropriate in California, as in most states, is the degree of "reprehensibility" of the defendant's conduct. This includes, but extends beyond, the precise conduct which supports the finding of liability. In California, as elsewhere, the jury is admonished to consider the "reprehensibility" of defendant's conduct "in light of the whole record." *See Neal*, 21 Cal.3d at 928, 148 Cal.Rptr. at 399. This is premised on the common sense observation that "clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal." *Id.*

The trial court in this case inexplicably stated that "Fraud is fraud" [RT 979:13] and barred evidence of the circumstances surrounding the fraud. Notwithstanding the earlier observation by the same trial judge that the evidence of fraud was "thin" and Justice Poche's comment that there was "scant" evidence of an intent to defraud by Hasso, the trial court prevented the jury from considering the evidence necessary for it to make an informed rational judgment about the character of Hasso's conduct, evidence which should have been central to the jury's decision.[12]

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[12] The trial court stated that *res judicata* barred the evidence. *Res judicata* is irrelevant, however, because the evidence was not offered to undermine the finding of liability. A jury considering that evidence could properly be instructed that it is insufficient to overcome a preponderance of the evidence in favor of plaintiff, but consider it relevant as to whether or how much to punish defendant for the liability. A recent case

(Continued on following page)

All frauds are not equal. The parties' reasons for entering the relationship out of which the fraud arose, the defendant's motives, the contributing conduct of the plaintiff, plaintiff's unclean hands, and the impact on the plaintiff, make liabilities unique. A statement of facts, bereft of all mitigating evidence, cannot fairly present a jury with the facts relevant to the defendant's defense.[13]

The award of punitive damages in this case violated Hasso's due process rights because Hasso was not allowed to defend himself. As a result, the award of $2 million was arbitrary because it bore no relation to the legitimate evidence of reprehensibility which Hasso was entitled to have the jury consider.

(Continued from previous page)

recognizes this principle. In *Hunter v. Spaulding*, 388 S.E.2d 630 (N.C.App. 1990), defendant was defaulted at trial for discovery abuse. Without hearing further evidence, the jury awarded $1.1 million in punitive damages on top of a $10,000 compensatory damages award. On appeal, the court held that the refusal to allow defendant to present mitigating evidence on the issue of punitive damages violated due process. *Cf. People v. Terry*, 61 Cal.2d 137, 145-47, 37 Cal.Rptr. 605, 611 (1964) (construing scope of evidence admissible under Penal Code section 190.1 in second penalty trial before jury which did not determine guilt, defendant entitled to present evidence regarding circumstances of crime in mitigation of penalty and to argue his innocence).

[13] *Compare* Fed. R. Crim. P. 25(b), which allows a judge who did not sit at trial to sentence a defendant *unless the judge cannot become adequately familiar with the facts of the case.* Although this statute has been held not to deny due process *per se, see, e.g., U.S. v. Whitfield*, 874 F.2d 591, 593 (8th Cir. 1989), courts have taken pains to note that the judge is required to, and in those cases did, take steps to learn the case, including reviewing the trial transcript, reading the presentencing report, and discussing the case with the trial judge.

The trial court's denial of Hasso's due process rights in this case stems ultimately from the absence of standards given to guide the discretion of the jury asked to punish a civil defendant for the "reprehensibility" of his conduct. California, like most other states, provides no articulable meaning to the critical element of "reprehensibility." In this case, the second jury was totally unfamiliar with the evidence in the liability trial and had to rely almost entirely on uninformed judgments about the nature of the underlying tort, and about the plaintiff and the defendant, in deciding to what degree the conduct was "reprehensible."[14] The court, too, without any stated definitions of reprehensibility, cannot consistently articulate and apply appropriate standards of relevancy.

The jury must be given greater guidance in assessing the appropriateness of an award of punitive damages in light of defendant's conduct. A defendant must be allowed to introduce, and the jury must be specifically instructed in accordance with, appropriate mitigating evidence in order to preserve the defendant's due process rights to defend against potentially ruinous awards.

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[14] In contrast, criminal statutes incorporate legislative determinations on the "reprehensibility" of particular crimes within the range of sentences prescribed. The statutory sentences presumably are the result of careful study and consideration of the broader community consensus on the social harm caused by particular conduct. The civil jury has no such statutory guides and cannot itself make more than an off-the-cuff assessment of the particular conduct at issue, isolated from the broader context of other similar liabilities and punishments.

II. THE AWARD OF PUNITIVE DAMAGES IN THIS CASE VIOLATED JOHN HASSO'S DUE PROCESS RIGHTS TO HAVE NOTICE OF THE CONDUCT FOR WHICH HE WAS BEING PUNISHED AND TO PRESENT A DEFENSE BECAUSE THE JURY WAS ALLOWED TO ASSESS PUNITIVE DAMAGES AGAINST HIM FOR TAKING A PARTIALLY SUCCESSFUL APPEAL OF THE JUDGMENT OF LIABILITY AND FOR STAYING EXECUTION OF THE JUDGMENT PENDING THE APPEAL.

Due process requires, at minimum, notice and an opportunity to defend. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994 (1972) (" 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified' "); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950).

Due process rights established in the criminal context are especially apposite here. This Court has long held that the due process right to notice and a hearing means that a person may not be convicted on charges not made or tried. *Jackson v. Virginia*, 443 U.S. 307, 314, 99 S.Ct. 2781, 2786 (1979). Conversely, due process provides an accused with the right to specific notice of the charges for which punishment is sought and a right to a hearing on the specific charges noticed. *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517 (1948).

Permitting a defendant to be punished for defending an action prevents a defendant from putting on a meaningful defense. This Court and others have recognized in both the civil and criminal context that punishing efforts to defend against a claim or charge subverts the due

process right to present a meaningful defense. *See, e.g., North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969) (prohibiting heavier sentence for successfully appealing conviction); *People v. Coleman*, 71 Cal.2d 1159, 1168-69, 80 Cal.Rptr. 920, 926 (1969) (in penalty phase of capital case, prosecutor may not argue that defendant's continued protestations of innocence demonstrates lack of remorse); *Palmer v. Ted Stevens Honda, Inc.*, 193 Cal.App.3d 530, 238 Cal.Rptr. 363 (1987) (in bad faith lawsuit, jury may not consider litigation tactics in ruling on liability and awarding punitive damages).

That the trial is for the sole purpose of awarding punitive damages, and punitive damages have traditionally been awarded in the virtually unfettered discretion of the jury, does not mean that a defendant has given up rights to a fundamentally fair procedure. On the contrary, because punitive damages are penal in nature and carry a substantial stigma not unlike a criminal conviction, due process standards ought to be even more carefully observed than in the usual civil case.

Because punitive damages were the central issue in the second trial, due process went out the window. While in a liability trial the claim is clearly defined, the evidence carefully circumscribed and the jury instructed as to the precise elements of the claim, no guidelines exist as to punitive damages with which similarly to define the proper scope of evidence and jury decision-making. Hasso was punished severely for conduct undertaken as part of his defense of the case which he could not know prior to the damage trial would be the basis for a multi-million dollar award. He was denied the opportunity to test the

charges that he committed wrongful conduct in connection with post-trial litigation. He was denied the opportunity to have the jury instructed as to the elements of whatever offenses he was alleged to have committed in connection with the post-trial litigation conduct and to insist that the jury make findings as to liability for that conduct before punishing him for it. *Cf. Presnell v. Georgia*, 439 U.S. 14, 15-16, 99 S.Ct. 235, 236 (1978) (punishment could not stand based on finding by Georgia Supreme Court that sufficient evidence existed when the jury had not made the findings necessary to support the punishment).

Absent legal standards defining the relationship between reprehensibility and punitive damages, a substantial risk exists in every case that the defendant will be punished for innocent conduct unrelated to the claim for which punitive damages are sought and justified. A defendant will be penalized for conduct with which he was not charged, as to which little or no discovery or pretrial motions designed to narrow the legitimate issues took place, and as to which the jury was not instructed to and did not find liability.[15] Under these circumstances, therefore, the jury cannot rationally make a legally valid judgment that the conduct merited a specific amount of punishment, or any punishment at all.

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[15] The problem is not confined to a separate damages trial following an appeal. In any case a defendant risks punishment for discovery tactics or settlement postures, or other conduct unrelated to the allegations of the complaint, if no check is placed on the scope of evidence and the jury's discretion.

III. THE PUNITIVE DAMAGES AWARD IS GROSSLY DISPROPORTIONATE TO HASSO'S NET WORTH, IN VIOLATION OF HASSO'S DUE PROCESS RIGHTS, BECAUSE THE JURY WAS GIVEN NO GUIDANCE AS TO WHAT AMOUNT WAS NECESSARY TO PUNISH AND DETER.[16]

A. Due Process Requires That The Jury Be Given Objective Guidelines In Calculating An Award Of Punitive Damages In Relation To Net Worth To Avoid The Imposition Of Arbitrarily Excessive Punishment.

Most states direct juries to consider a defendant's net worth in awarding punitive damages so that an award will sufficiently "hurt," punish and deter the defendant. A procedure for awarding punitive damages which does not take into account a defendant's net worth risks either punishing too severely or punishing not enough. Similarly, a procedure which permits a jury to consider a defendant's net worth but which does not impose any other guidelines or limitations on the jury's discretion risks an imposition of punitive damages which is arbitrary with respect to the purpose for punitive damages: to punish and deter. There is no rational basis for permitting awards of punitive damages which are far in excess of what is reasonably necessary to "make the point" with a particular defendant. The jury therefore must be guided by objective criteria when considering a defendant's net

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[16] Hasso also contends that the award of punitive damages in an amount which is more than four times the actual damages also violates his due process rights. Hasso respectfully requests that the Court consider this question in connection with the identical question raised in *Pacific Mutual*.

worth in order to avoid arbitrary awards which deny a defendant due process.

B. The Criteria For Granting Remittitur And For Appellate Review Are Too Vague And Deferential To The Jury To Cure The Lack Of Due Process.

The trial court's discretion in reviewing a jury's award of punitive damages is as broad and as unfocused as the jury's. In California, the trial court in ruling on a motion for new trial on the ground of excessive damages has the discretion to determine what is "fair and reasonable" in light of its own review of the record. *West v. Johnson & Johnson Products, Inc.*, 174 Cal.App.3d 831, 876, 220 Cal.Rptr. 437, 465 (1985). The law provides no other guidance. The meaning of "reprehensibility," and of the appropriate relationship between punitive damages and net worth or actual damages, provide no greater direction to the court than they do to the jury.

Moreover, appellate review of a punitive damage award accords extraordinary deference to the jury's decision. A reviewing court will disturb an award only if, in light of the record as a whole, it appears to be the product of "passion or prejudice." *Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910, 927-28, 148 Cal.Rptr. 389, 399 (1978). *See also* App., *infra*, B27-28. This standard of review defers so much to the jury's discretion that it cannot reasonably be said to afford a consistent and rational basis for curing arbitrary awards by the jury.

No decision-maker contemplating a business or personal decision which might place him or her at risk of

liability could rationally assess the possible consequences of the conduct. Petitioner submits that the inherent uncertainty in the penal consequences of particular conduct, an uncertainty compounded by the absence of careful review, fails to meet due process standards. *See United States v. Batchelder*, 442 U.S. 114, 123, 99 S.Ct. 2198, 2204 (1979).

IV. CONCLUSION

In conjunction with *Pacific Mutual*, this Court is uniquely positioned to consider comprehensively under the Due Process Clause the procedures and jury guidelines employed in punitive damages cases. This case in particular provides the Court with an opportunity to define the due process limits on the mitigating evidence which a jury *must* be allowed to consider and on the extraneous evidence which a jury *must not* be allowed to consider. The due process limits on admissible evidence should be decided in conjunction with defining appropriate guidelines for the jury's discretion.

Respectfully submitted,

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF NAPA

CHARLES A. DUGGAN, Plaintiff, vs. JOHN HASSO, et al., Defendant.	COURT NO. 39855 FILED JUN 13 1988

NOTICE OF DECISION ON MOTION FOR NEW TRIAL OR REMITTITUR OF PUNITIVE DAMAGES

Defendant seeks a new trial on three grounds. They will be addressed in the same order in which argued. Defendant's first ground is that the court erred in excluding evidence of the facts underlying this action. It is still the belief of the court that no error was committed in this respect for the following reasons. Defendant proposed a statement of facts which the court largely adopted in an effort to avoid "retrying" the liability phase of the case. It is the court's recollection that it accepted most of defendant's proposed statement of facts, sometimes over plaintiff's objections and that both parties concurred in this general procedure. The court has no recollection of any evidence of "mitigation" offered by defendant other than matters that had previously been submitted to the jury on the liability phase and rejected in the jury's finding of liability. Also there were matters that were addressed by the court in its statement of decision which were relevant only to the equitable issues submitted to the court in the first trial and were apparently not

considered to be relevant by the jury in its determination of liability in the first trial. It was the court's belief at the time that these rulings were made that by barring both parties from relitigating the liability phase of the case they were placed on an equal footing regarding the facts giving rise to the liability determination. It was the belief of the court that this procedure might actually work more to plaintiff's detriment than to defendant because it denied plaintiff the opportunity to present and argue the underlying fraud except from the bare record presented by the statement of facts given by the court. The so called "torrent of blows" which plaintiff rained on defendant throughout the trial were the result of defendant's conduct since the first verdict in attempting to "shelter" (and conceal?) his assets and his often deceitful testimony in explaining his post-trial conduct. For the foregoing reasons, the court rejects this ground asserted by defendant for a new trial.

The second basis for defendant's motion for new trial, is that the court erred in excluding evidence of "defendant's unqualified pretrial offer to pay plaintiff a substantial portion of his profits". The court believes that it enunciated its reasons for rejecting this offer sufficiently at the time it ruled, but an attempt will be made to repeat them. This court, at first, believed the offer to be a "stroke of genius" on the part of defendant's trial counsel. But on reflection, it became clear that the offer was a classic example of "too little, too late" and that it was illusory. It had been brought to the court's attention that the 2.5 million dollar cash deposit posted in lieu of an appeal bond was the subject of inquiry and claims for

back taxes from the California Franchise Tax Board addressed to the Napa County Clerk. There was then, and continues to be, a concern arising out of the fact that apparently the recipient of the income from this 2 -1/2 million dollar deposit has not been paying California Income Taxes on that income. Although the facts are not yet fully known, there is a concern on the part of counsel for plaintiff and Napa County Counsel that no taxes have been paid to the Internal Revenue Service either. The ownership of those funds has been disputed for the last several years, the defendant's ex mother-in-law (the mother of his now divorced spouse) contends that the money is hers and that she is a non-resident alien, not required to pay income taxes. The defendant has testified during this trial that the money is his, having been advanced by his cousin, Allen Hasso, in a loan transaction securred [sic] by one of the properties which was the subject of the transactions between plaintiff and defendant. Furthermore, defendant has testified that he ultimately granted a deed in lieu of foreclosure to his cousin, Allen Hasso, thereby satisfying the indebtedness and that therefore the entire 2-1/2 million dollars belongs to him, and perhaps a portion to his ex-spouse if it is found to be community property. In view of this dispute, it appeared to the court that defendant's eve of trial tender of a portion of those funds created enormous legal, practical and evidentary problems were it to be presented to the jury. Plaintiff would be put in the position of explaining his reluctance to accept it. County Counsel representing the Napa County Clerk would be obligated to take a position on whether the County Clerk could authorize the release of the funds, and the resulting confusion of

issues and expenditure of time involved in explaining the entire matter far outweighed the probative value. The court did indicate to defendant that if he wished to make a cash tender on account of compensatory damages, that it would allow evidence of that. Defendant apparently chose not to make any such tender (not even of a lesser sum) and accordingly no evidence on this issue was presented to the jury. The court notes that defendant was able to transfer property with a value in excess of 1 million dollars to his new spouse as "dowry". Had the defendant chosen to borrow on that property or to offer to transfer a portion to plaintiff in an effort to mitigate the damage, the court would have allowed evidence of that to be presented and so indicated by its rulings at the time. Accordingly, the court feels that it committed no error in this respect and denies defendant's motion for a new trial upon that ground.

The third ground asserted by defendant is that the award of punitive damages is excessive as a matter of law. This is the most difficult aspect of defendant's motion. This court has now presided over two trials between these parties and has reached many conclusions many of which have been expressed on the record at one time or another. At various times during the first trial in an effort to encourage the parties to settle, this court opined that the evidence of fraud was thin. As has been indicated by the court earlier, these comments were made prior to completion of the case and argument of counsel. The issue of fraud was of course tried to the jury and the jury concluded in the first trial that a fraud had been committed. This court refused to set aside that finding on the ground that there was substantial evidence before the

trier of fact upon which such a finding could be based. The Court of Appeal agreed. This court did indicate in its notice of decision following the first trial that there were some mitigating circumstances including the duel [sic] role played by attorney Humphries in his preparation of the original memorandum of understanding. While this court still believes that to be a mitigating factor to a small degree, the fraud finding by the jury implied a finding, by which this court is bound, that the defendant had no intention of carrying through with his promise to share profits with the plaintiff and thereby perpetrated a fraud upon plaintiff. The first jury believed that that fraud warranted an award of punitive damages in the amount of approximately $1,100,000. This jury on retrial has now increased the award to $3,000,000.

The evidence before this jury upon which it presumably relied in reaching such a result is that the defendant has compounded his original fraud by weaving a web of deceit regarding his assets in which he became entangled during the second trial. To put it bluntly, the defendant has no credibility and, in this court's opinion, has committed perjury during these proceedings. Apparently a United States bankruptcy judge made a similar determination during defendant's attempt to find relief in the bankruptcy court following the first trial. The defendant gives the impression of a man who will say anything if it benefits him whether under oath or not and whether true or not. He gave this impression during the first trial and has reinforced it during the second trial. It is obvious that two juries, by a unanimous vote each time, have reacted to defendant similarily. The question then turns to the

issue of how is that conduct in the original fraud appropriately punished. Defendant argues that the current award amounts to "capital punishment" and will be "utterly, totally, and irrevocably ruinous to defendant". Frankly, it is hard to tell whether there is any truth to these assertions or not. The defendant has lied so many times about his assets that it is truly impossible to know the full measure of his wealth. Plaintiff argued that he could have wealth based on the evidence presented exceeding $20 million. Defendant contends that he is nearly impoverished except for a million here or a half million there. Obviously, if defendant is believed, the $3 million dollar punitive damage verdict would be outrageous and properly characterized as devastating. On the other hand, if the defendant has managed to accumulate the level of wealth ascribed to him by plaintiff, he is an enormously wealthy man, to whom a $3 million dollar punitive damage award would be damaging, but not ruinous. Quite frankly, the difficulty is in knowing where the truth lies and in all probability it is somewhere in between. Based on the evidence, this court is not able to say that the jury's implied finding of defendant's wealth was not supported by substantial evidence. Frankly, for defendant to suggest in his new trial motion that the punitive damage award should be reduced to $75,000 is ludicrous, but represents and is typical of the unrealistic attitude which defendant appears to have taken toward this dispute with plaintiff and the ensuing litigation. The court is mindful of the guidance provided by the Court of Appeal in *Sealy vs. Seymour* cited by defendant in which the court states that it is not aware of a six or seven figure punitive damage award against a private individual. This court is

also aware of the possibility that the large punitive damages awarded by both juries against this defendant may have been the product of an antipathy toward the defendant rather than simply, "the gravity of his wrongful conduct", although when the wrongful conduct is compounded by the type of deceit demonstrated by the defendant during this most recent trial, the deceit seems to become part of the original fraud and equally punishable by a punitive damage award.

This court has concluded that it will grant a new trial on the issue of punitive damages unless plaintiff agrees to remit all but $2 million dollars of that award (exclusive of the $483,584 compensatory damage award (to which defendant agreed in argument). In other words, the total award would be $2,483,584. The court's reasoning in arriving at this sum is that; (1) the court believes that defendant's wealth is greater than he acknowledged at trial. It is probably less than $20 million dollars, but certainly considerably greater than he acknowledges. The first jury had evidence before it from which it could have been reasonably inferred that his wealth at that time was in excess of $10 million dollars. (2) The defendant has posted a cash deposit in lieu of an appeal bond in the amount of $2.5 million dollars and testified numerous times during the trial that he viewed this deposit as being there to "protect plaintiff". A remission to $2,483,584 can be satisfied from the cash deposit and allows defendant to apply the deposit to satisfy the judgment and to go on about his business as to his other assets without further liability to plaintiff. (3) The award while high and perhaps higher than has been recognized by any previous

California reported case against an individual, is warranted considering the totality of the facts and circumstances in this case including the original fraud, and the defendant's compounding conduct during the last several years, all of which have been an affront to the court system and this community's sense of fair business practices.

Therefore, pursuant to CCP 662.5, the court in the exercise of its independent judgment determines a punitive damage award of $2 million dollars together with the compensatory damage award agreed to by the parties and ordered by the jury to be fair and reasonable. If the reduction in damages is not acceptable to plaintiff, then defendant shall have a new trial upon the issue of punitive damages. If the reduction is acceptable to plaintiff, then defendant's motion for a new trial is denied in all respects. Plaintiff shall have 15 days within which to make his election and file his consent or rejection to the reduction.

Dated: June 13, 1988

/s/ Philip A. Champlin
Philip A. Champlin
Judge of the Superior Court

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FOUR

CHARLES A. DUGGAN, Plaintiff and Respondent, v. JOHN HASSO et al., Defendants and Appellants.	A042843 Super. Ct. No. 39856 (Napa County)

A jury awarded Charles Duggan (plaintiff) $483,584 in compensatory damages and $3 million in punitive damages on his claim against John Hasso (Hasso) et al. (collectively defendant)[1] for fraud in connection with a series of real estate transactions, compounded by what the trial court described as Hasso's attempts to shelter or conceal assets and deceitful testimony concerning his net worth. Defendant moved for a new trial on punitive damages, and the trial court ruled that it would grant the motion unless plaintiff agreed to reduction of the punitive damage award to $2 million. Plaintiff agreed to the reduction, but reserved his right to appeal from the new trial order if defendant appealed from the reduced judgment.

Defendant appeals, arguing that the $2 million punitive damage award must be reversed because it resulted

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[1] The other defendants on the fraud claim are corporate alter egos of Hasso.

from erroneous evidentiary rulings and is excessive as a matter of law. Plaintiff cross-appeals, arguing that the original $3 million award was improperly reduced because the notice of motion for new trial was defective and inadequate reasons were stated for the ruling on the motion. We affirm.

I. BACKGROUND

A. The Underlying Dispute, First Trial and First Appeal

These appeals arise from the second trial in this case. The following facts are derived from this court's opinion on the appeal from the first judgment.

In 1977 plaintiff and Hasso orally agreed that plaintiff would locate, evaluate and negotiate the purchase and sale of real estate, and Hasso would provide funds to purchase and develop the properties. They discussed working together in a partnership in which Hasso would receive an 85 percent interest and plaintiff a 15 percent interest in the partnership's capital and profits. Hasso loaned plaintiff money for living expenses while the latter took a leave of absence from a teaching position and proceeded to negotiate the acquisition of a number of properties. Title to the properties was taken in the name of Hasso family members or offshore corporations controlled by the Hasso family. Eight properties were eventually acquired for an aggregate purchase price of approximately $1.65 million.

The only written agreement between the parties was a brief memorandum of understanding regarding their "oral partnership," which reflected their respective 85

and 15 percent interests in partnership profits. Hasso orally agreed to put plaintiff's name "in title for 15 percent on the property," but he declined to execute a more detailed joint venture agreement and eventually advised plaintiff that he was terminating their relationship.

Plaintiff sued inter alia for quantum meruit, fraud and for dissolution and accounting of an alleged partnership, and defendant countersued. Plaintiff's equitable claims were tried to the court, which found that no partnership existed but awarded plaintiff $156,435 for quantum meruit. The jury found in favor of plaintiff on the fraud claim, awarding $541,359 general and $1,101,549.75 punitive damages, and rejecting defendant's counterclaim. Judgment was entered on the fraud verdict and defendant appealed.

We concluded that plaintiff was entitled to recover damages for fraud, but reversed and remanded for a retrial of the damages issues because evidence supporting the award of compensatory damages had not been limited to profits from sales of the properties. In view of errors affecting the calculation of compensatory damages, we ruled that a redetermination of punitive damages was also required. Our prior opinion notes that plaintiff presented evidence in the first trial from which the jury could infer that Hasso's net worth was in excess of $10 million.

B. The Second Jury Verdict and Subsequent New Trial Ruling

The parties stipulated before the retrial that all of the properties had been sold, and the remaining disputes

about compensatory damages were eliminated when defendant changed his position during the course of the retrial and abandoned claims to certain deductions from net profits. Punitive damages thus became the principal focus of the second trial, and most of the testimony and argument was directed to the issue of defendant's net worth.

The trial took approximately 12 days over several weeks. In closing argument, defense counsel suggested that the jury consider an award of punitive damages of "around $50,000." Plaintiff's counsel asked for $2.5 million. It took the jury less than four hours to return its $3 million verdict.

The notice of decision on the new trial motion includes the following comments: "Defendant contends that he is nearly impoverished except for a million here or a half million there . . . . To put it bluntly, the defendant has no credibility and, in this court's opinion, has committed perjury during these proceedings. The defendant gives the impression of a man who will say anything if it benefits him whether under oath or not and whether true or not. He gave this impression during the first trial and his reinforced it during the second trial. It is obvious that two juries, by a unanimous vote each time, have reacted to defendant similarly. . . . [¶] The [reduced] award while high and perhaps higher than has been recognized by any previous California reported case against an individual, is warranted considering the totality of the facts and circumstances in this case including the original fraud, and the defendant's compounding conduct during the last several years, all of which have

been an affront to the court system and this community's sense of fair business practices."

C. Lack of Credibility on the Issue of Net Worth

Hasso attempted to convince the second jury that his net worth had declined substantially since the first trial, but the attempt backfired. In the words of the trial court, it must have appeared to the jury that defendant had "compounded his original fraud by weaving a web of deceit regarding his assets in which he became entangled during the second trial. . . . The defendant has lied so many items about his assets that it is truly impossible to know the full measure of his wealth." We will outline this aspect of the record at the outset to place the jury's verdict, the new trial ruling and the present appeals in a proper perspective. The balance of the record will be addressed in the discussion below, insofar as it is pertinent to the parties' contentions.

At a deposition two months before trial, Hasso testified that aside from assets in Iran and assets claimed by Hebe Hasso, from whom he was divorced between the first and second trials, his net worth was approximately $50,000. At trial, Hasso explained this figure as follows: "I have $50,000 in the bank, yes. It's now reduced to $6,000." Hasso's daughter, Susie Pratt, took the stand for the defense and a portion of her testimony reads as follows: "Q. What's the change in lifestyle, if any, that you have observed if (sic) your father over the last say four years? [¶] A. Well, I can give an example of the cars he drives. [¶] Q. What's the example? [¶] A. I mean he

drives cars that barely run. He hardly has money, you know, for a car."

But the defense was forced to backpeddle in the face of testimony suggesting that Hasso's wealth exceeded $10 million dollars, including profits of more than $2 million from the properties acquired through the original fraud. In opening argument, defense counsel stated that Hasso "controlled" only $200,000. In closing argument, defense counsel maintained that the evidence disclosed a net worth of only $2.5 million. At the hearing on the motion for new trial, counsel argued that the evidence did not support a finding of net worth in excess of $4.3 million.

Backpeddling was also required in connection with the $1 million "dowry" Hasso transferred to his new wife, Ruth Hasso. In opening argument, defense counsel said it was "questionable" whether properties included in the dowry should be considered part of Hasso's net worth because he no longer controlled them. Ruth Hasso, a widow with four young children, was later permitted to testify over plaintiff's objection. She stated that she would "consider" Hasso's request about how the dowry would be spent, but she would not automatically do what Hasso told her, and she would definitely sell the property in the event of a family emergency. At the hearing on the new trial motion, the court remarked that the purported transfer of property to Ruth Hasso appeared "transparently deceitful." Defendant may have come to the same conclusion because, in closing argument, his counsel conceded that his net worth included the dowry.

Hasso described his financial affairs in terms of losses, foreclosures, attorneys' fees and living expenses.

Aside from property left in Iran after Hasso moved to the United States, most of the losses were allegedly sustained as the result of a property settlement agreement with Hebe Hasso. The property settlement was evidently still in dispute, and the evidence indicated that Hasso's divorce was less than amicable. But even here there were grounds for suspicion. Hasso's testimony suggested that Hebe received the valuable liquid assets, while he was left with assets of questionable value. Although Hasso said he had a community property interest in the $2.5 million deposited to stay execution of the first judgment, he could not account for his half of the five years' interest on that amount. The court later commented, outside the presence of the jury, that "it's a lot of money. And I just find it very difficult to accept that anybody claiming to own that amount of money is totally ignorant of where the interest on it is really going."

The $2.5 million was evidently deposited by Augusta Maidani, Hebe Hasso's mother. Hasso testified, however, that he had actually borrowed the money from his cousin, Alan Hasso. Interest on the deposit was payable to Maidani, but Hasso thought that it was being collected by Hebe Hasso pursuant to a power of attorney from her mother. It appears that defendant later transferred certain of the parcels acquired with plaintiff's help to a corporation controlled by Alan Hasso to pay off the loan. In his pretrial deposition, Hasso testified that the loan was paid in full by virtue of these transfers. But he testified at trial that Alan Hasso would in fact hold him personally liable for any unpaid balance of the loan remaining after the properties were sold. Hasso also testified that Alan Hasso had advised him, on the eve of trial, that Alan felt he had

a "moral obligation" to reconvey the properties if Hasso could repay the loan by other means.

Neither Hebe Hasso, Alan Hasso nor Augusta Maidani testified at the trial. Maidani, however, had evidently journeyed from her home in Lebanon to make a pretrial motion to withdraw the deposit on the basis that it was her money. All of this led the court, at another recess in the proceedings, to make the following observations:

"The whole thing is, it seems to me a – strongly suggest a familiar – well, for lack of a better word, conspiracy. . . . [¶] The thing – the things that I'm relying on to make that remark are the contention that was made to me last year that the two and a half million dollars belonged to Mrs. Maidani. [¶] The suggestion that – that no continuance should be granted Mr. Jacobson to respond to her motion because she had made a special trip here from Lebanon to be present when the motion was heard, and presumably take the money, if her motion was granted. [¶] And now my discovery is that, in fact, the money is not hers and never has been hers. She was simply a conduit. . . .

"Plus the fact that apparently the – there was an issue now pending as to whether anyone has been paying income taxes on the interest. We don't know, really to whom the money has been going. . . . [¶] Plus this other factor that I've alluded to where it appears that Mr. Hasso, while under the threat of this case, transferred most of his assets and value to his former spouse, keeping only assets without value. . . . [¶] Plus this new disclosure that what was an unconditional conveyance of

the Watts Property of Alan Hasso is not, in fact unconditional. And there is some sort of an unwritten, perhaps even unarticulated, moral commitment felt by Alan Hasso to reconvey the property to Hebe Hasso and possibly even John Hasso in exchange, I guess, for repayment of the moneys that he loaned. [¶] All of which indicates to me that this is a very close family who circled the wagons apparently when under attack . . .

"I'm particularly annoyed by Mrs. Maidani's representations through counsel that that two and a half million dollars was hers . . . [¶] That money, had I succumbed to her assertions and released it to her, I'm certain would be long gone by now. It would be back in Lebanon. And there would be absolutely no security. . . . [¶] I think Ms. Maidani came very close to perpetrating what was amounted to a fraud in this court. [¶] And I think by implication, John Hasso must have been a party to that because he stood by and allowed her to come into court through counsel and to represent to me that she was the owner of that money, when his testimony in this proceeding has clearly indicated he was the owner of it."

The jury was apprised of Maidani's motion to release the deposit. They were made aware of contradictions between Hasso's deposition and his trial testimony about repayment of the $2.5 million loan and other financial matters. They were also informed of Hasso's bankruptcy petition following the first judgment, the fact that the petition was dismissed, and the finding of the bankruptcy court that Hasso made "various misstatements of fact" in his declaration under penalty of perjury to the trial court and this court to stay execution of the first judgment. The declaration evidently overstated Hasso's equity in one of

the properties acquired with plaintiff's assistance by failing to disclose a $1,000,500 encumbrance in favor of Hebe Hasso. Hasso testified that he did not refer to this deed of trust because he thought it "was just a formality, and not a necessity, because I was with her as community, joint community holder of all our assets, even though she had demanded that I give her a deed of trust, which I did, but I didn't think it has a value." Hasso had stated earlier, with respect to the declaration, "It would appear that I made misstatements, yes. I am a human being, and I possibly might have misled intentionally or unintentionally, but if the court will allow, at its convenience, that I can explain these facts, and if I am declared a liar I will accept the court's ruling with pleasure."

II. PLAINTIFF'S APPEAL

We will first address plaintiff's contentions that the punitive damage verdict was improperly reduced as a result of the motion for new trial.

A. Notice of Motion for New Trial

Plaintiff contends that the court lacked jurisdiction to entertain the motion for new trial because defendant did not serve Hebe Hasso with notice of the motion. (See Code Civ. Proc. § 659 [requiring service of notice of motion for new trial on "each adverse party"]; and *Johnston v. City of San Fernando* (1939) 35 Cal.App.2d 244, 246 [service on adverse parties a jurisdictional requirement].) The sole purpose of the second trial was to determine the

damages owed on account of the fraud claim. Since plaintiff dismissed Hebe Hasso on the fraud claim during the course of the first trial, she was not a party to the second trial and was never provided with notice thereof. The trial court noted at one point that Hebe Hasso was not a party to the retrial, and plaintiff's counsel acknowledged that the retrial would not "result in any kind of money judgment that names Hebe Hasso." In these circumstances, Hebe Hasso was not an "adverse party" within the meaning of Code of Civil Procedure section 659 for purposes of defendant's new trial motion.

Plaintiff notes that Hebe Hasso was interested in the outcome of the second trial to the extent that her community property would be liable to satisfy the judgment, and he relies on authorities suggesting that an adverse party is one who may be "affected by" the ruling on the motion. (See, e.g., 8 Witkin, Cal. Procedure (3d ed. 1985) Attack on Judgment in Trial Court, § 52, p. 452). That logic is too broad, however, because it would require service on everyone with any stake in the moving party's finances whether or not they were parties to the action. Hebe Hasso was a party to the initial action insofar as it sought to impose a constructive trust on her assets, and the court reserved jurisdiction after the first trial to make orders incident to that cause of action. But we fail to see how any constructive trust would extend beyond profits belonging to plaintiff and profits were not at issue in the motion, which sought a new trial only with respect to punitive damages.

Plaintiff also speculates that Hebe Hasso may have wanted to appear in support of a $3 million punitive damage award that could be levied against her property.

But we agree with defendant that, whatever their differences on other matters, the interests of John and Hebe Hasso were aligned on the motion for new trial. Even if Hebe were a "party" to the second trial, she could not be fairly viewed as an "adverse" party with respect to the new trial motion. (See *United States v. Crooks* (1897) 116 Cal. 43, 45 [adverse party is one "whose interest may be injuriously affected by a reversal or modification of the judgment"]; and *Spruce v. Wellman* (1950) 98 Cal.App.2d 158, 160 [adverse party is one "who will be adversely affected by the granting of the motion"].)

We find no error in connection with the notice of motion for new trial.

B. Statement of Reasons for Reduction of Verdict

Plaintiff argues that the conditional order granting the new trial motion must be reversed because the reasons given for the order were inadequate under Code of Civil Procedure section 657. This statute provides in pertinent part that: "When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated. [¶] A new trial shall not be granted . . . upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision. [¶] . . . [o]n appeal from an order granting a new trial . . . upon the ground of excessive or inadequate damages, it shall be conclusively

presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons."

A statement of reasons is required to insure that the ruling is the product of careful deliberation and to provide a basis for meaningful appellate review. (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 363.) "To avoid overtaking our already burdened trial courts, it will be sufficient if the judge who grants a new trial furnishes a concise but clear statement of the reasons why he finds one or more of the grounds of the motion to be applicable to the case before him. No hard and fast rule can be laid down as to the content of such a specification, and it will necessarily vary according to the facts and circumstances of each case." (*Id.* at p. 370.)

The circumstances of this case are somewhat unusual. Although the court determined that the punitive damage verdict was excessive as a matter of law, it was more concerned about justifying the reduced figure and so most of its reasoning supports substantial punitive damages rather than their reduction. Careful deliberation is in any event apparent from the statement of decision, and the statement provides a sufficient basis for appellate review.

The court noted that, while it was "truly impossible to know the full measure of [defendant's] wealth . . . [i]t is probably less than $20 million." The record supports this conclusion because there was no proof that defendant's net worth exceeded $20 million apart from assets

in Iran and assets of Hebe Hasso in Lebanon. The court also noted that since the reduced award could be satisfied from the cash on deposit to stay execution, defendant could absorb the liability and "go on about his business as to his other assets without further liability to plaintiff." It is apparent from this reasoning that the court reduced the verdict because it felt that a $3 million award would represent a disproportionate share of defendant's net worth (see *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 469), and it did not want to ruin defendant (cf. *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 [punitive damages may not exceed "the level necessary to properly punish and deter"]).

We conclude that the court adequately explained its reduction of the punitive damage verdict.

III. DEFENDANT'S APPEAL

Turning to defendant's appeal, we will first address the evidentiary points and then the contention that the $2 million award is excessive as a matter of law.

A. Exclusion of Evidence of Parties' Initial Relationship

The first argument is that the court improperly excluded evidence of circumstances surrounding the original fraud. Defendant asserts that the punitive damage award was improper because the jury could not assess the original fraud "in context" without evidence of the parties' initial relationship.

When a reviewing court finds error in connection with assessment of punitive damages, it may inter alia

remand for a new trial on all issues or on the issue of damages alone. (See *Cunningham v. Simpson* (1969) 1 Cal.3d 301, 310.) In this case, rather than remand for a retrial of defendant's fraud, we held that a new trial was required with respect to damages only. Accordingly, under the doctrine of res judicata, the judgment that defendant committed fraud became final and binding on the parties. (Code Civ. Proc., § 1908, subd. (a).)

There was considerable argument prior to the retrial about the extent to which evidence surrounding the original fraud could be reintroduced. Defense counsel cited *Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 928, for the proposition that punitive damages depend upon the reprehensibility of a defendant's acts "in light of the whole record," and argued that he should be allowed to present any evidence of the parties' initial relationship that would tend to put defendant in a more favorable light. Plaintiff argued that such evidence should be excluded because the issue of fraud had already been determined.

Both sides submitted proposed statements of fact to be submitted by way of background to the jury. Defendant proposed a statement derived from our prior opinion, and plaintiff countered with what may be characterized as a more argumentative version. The court adopted defendant's version with a few modifications. Our description of the original equitable claims and their resolution was deleted, along with language to the effect that an attorney "supposedly representing" Hasso's interest prepared the memorandum of understanding. Language was added to indicate that Duggan had repaid Hasso's loan for living expenses.

The court ruled that evidence of the original relationship would be limited to this statement of facts, telling the jury: "essentially what I have determined is that we're not going to retry the facts that led up to the first jury's determination that there was a fraud committed. . . . I'm not going to let evidence come in by either side as to all of the details and circumstances that essentially took us almost six weeks to present. [¶] This is a case that's limited to damages. And the facts insofar as they are relevant to the damage computation are going to be as set forth in this statement of facts." The court noted during a recess that circumstances surrounding the original fraud could be "terribly confusing to the jury. It would be confusing enough to me to tell them on the one hand there is a fraud determination, then to present them with a whole lot of evidence on – generally from which it will be argued, well, it was just a little fraud. It wasn't a big fraud. It was a mistake. It wasn't a fraud at all." The court also pointed out that its ruling afforded "equal treatment" to both sides, and would also hamper plaintiff inasmuch as the first jury was sufficiently "impressed" by evidence surrounding the original fraud to award punitive damages of over $1 million.

Defendant contends that the ruling was prejudicial because it led to exclusion of: (1) evidence of the details of Hasso's loan to plaintiff; (2) evidence of plaintiff's participation in setting up the off-shore corporations that took title to certain of the properties; (3) evidence that plaintiff supplied the terms of the memorandum of understanding; and (4) evidence that an attorney associated with plaintiff advised Hasso that he need "do nothing" to terminate his relationship with plaintiff.

None of this had any bearing on Hasso's false promise to share his profits with plaintiff, and our overall assessment is that the probative value of this evidence, if any, on the issue of Hasso's reprehensibility would have been slight by comparison to its potential for confusion and undue consumption of time. Accordingly, we find no abuse of discretion associated with its exclusion under Evidence Code section 352.

We will briefly address each item. Defense counsel stated in opening argument that an attorney told Hasso he need do nothing to terminate his relationship with plaintiff. Plaintiff objected and the jury was excused. Defense counsel explained the statement by reading from a memorandum the attorney prepared regarding his conversation with Hasso. The memorandum contradicted the argument. In it the attorney wrote, "I suggested to John that he sit down with Charles and make sure that there were no misunderstanding and that he confirm that in writing to Charles." Since the evidence would not have supported the proposed line of argument, we need not reach the court's reasons for preventing it under Evidence Code section 352.

Defense counsel asked plaintiff on cross-examination whether he supplied the memorandum of understanding, plaintiff answered "yes," and plaintiff's counsel objected. The objection was not sustained. The court ruled that it would permit inquiry about the memorandum insofar as it related to calculation of profits. The jury thus learned that plaintiff set the terms of the memorandum.

The argument with respect to the offshore corporations is that while the court rejected an offer of proof that plaintiff participated in their creation, it later permitted defendant to be cross-examined about the corporations, and the questioning was "laden with innuendo of supposed trickiness." There was no objection to the cross-examination to which defendant refers. It was clear, both from the cross-examination and the original statement of facts, that offshore corporations were used on the advice of counsel. Accordingly, it does not appear to us that defendant was "tarred" by evidence of the use of tax havens.

Hasso's loan to plaintiff was described in the statement of facts, the description was contested and both sides eventually agreed to the language. We do not believe that the jury would have formed a different impression of Hasso if it had learned that the loan was interest free and exceeded plaintiff's salary as a teacher.

Returning to defendant's underlying point, we are aware of no authority indicating that all evidence pertaining to liability, no matter how marginal and no matter what its potential for confusion and consumption of time, must be admitted when punitive damages are retried after liability has been determined. Cases referring to reprehensibility in light of the "entire record" do not so hold, and so such assertion appears in *Medo v. Superior Court* (1988) 205 Cal.App.3d 64, or *Zhadan v. Downtown L. A. Motors* (1976) 66 Cal.App.3d 481, the other cases upon which defendant relies.[2]

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[2] In *Medo*, we interpreted 1987 amendments to Civil Code section 3295, subdivision (d), to require that the issue of

(Continued on following page)

The court did not err in limiting evidence of the original fraud to the statement of facts established in the first trial.

B. Evidence of Defendant's Conduct During the Course of the Lawsuit

Defendant next contends that he was in effect punished for exercising his legal rights because evidence was admitted and argument was allowed about actions taken in defense of the lawsuit. Defendant's principal concern is with efforts to stay execution of the first judgment, which he asserts "became the focus of much of the retrial." Our initial response based on our review of the

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punitive damages be tried to the same jury that determined the defendant's liability. We observed that "[i]n order for a jury to evaluate the oppression, fraud or malice in the conduct giving rise to liability in the case, it must consider the conduct giving rise to liability." (*Medo v. Superior Court, supra*, at p. 68.) The 1978 amendments to Civil Code section 3295, subdivision (d) do not apply in this case because the initial trial was commenced before January 1, 1988. (Civ. Code, § 3295, subd. (f).) *Medo* does not in any event hold that Evidence Code section 352 is abrogated in retrials of punitive damages.

The *Zhadan* court found that excessive punitive damages had been awarded and decided to remand for a new trial on all issues because there was "virtually no evidence relating to the matter of liability which would not also be pertinent to the issue of damages." (*Zhadan v. Downtown L.A. Motors, supra*, 66 Cal.App.3d at p. 502.) The court also acknowledged, however, that it could have ordered a new trial on damages alone, and it had no occasion to consider the application of Evidence Code section 352 in that context.

record is that conduct of the litigation was not the "focus" of the retrial. The second trial focused primarily on defendant's net worth and his unsuccessful attempts to show that it had dwindled. Matters pertaining to defense of the lawsuit as such represent only a very minor portion of the record.

Defendant characterizes the retrial as a "textbook violation" of reasoning in *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530. The *Palmer* court remanded for a new trial on punitive damages because it determined that evidence of the plaintiff's actual damages had been erroneously excluded, and evidence of the plaintiff's attorneys' fees and the defendant's litigation tactics had been erroneously admitted. The plaintiff had been allowed to testify, over objection, that he prevailed on 15 pretrial law and motion matters, 3 with sanctions, and incurred attorneys' fees of $56,000 in the process. The court stated that penalties for bad faith discovery positions were a matter for the law and motion judge, and that admission of evidence of discovery battles failed " 'to consider or accord any weight to the right of a defendant to defendant itself.' [Citation.]" (*Id.* at p. 540.) The court also observed that the plaintiff's attorneys' fees were "completely irrelevant" to the defendant's state of mind. (*Ibid.*) With this reasoning in mind, we will proceed to the evidence to which defendant objects.

Defendants maintains that the statement of facts improperly referred to his unsuccessful cross-complaint against plaintiff in the initial action, and contends that the reference in effect allowed plaintiff to recover for malicious prosecution. After noting that plaintiff prevailed on his fraud claim in the first trial, the statement

indicates that "[t]he jury also found against John Hasso on his counterclaim of fraud against Charles Duggan." This language is derived from our prior opinion, which defense counsel submitted as the suggested statement of facts. The trial court followed defense counsel's initial suggestion, and included the statement to dispel any implication of wrongdoing by plaintiff in connection with the original transactions. The court noted that such an impression, contrary to the first verdict, could have been created by other portions of the statement of facts indicating that plaintiff had been associated with the attorney who advised Hasso about the memorandum of understanding. A brief reference to the cross-complaint was properly included on that basis, and its appearance in the statement of facts was not tantamount to a charge of malicious prosecution.

Another argument is that evidence of the objection to Hebe Hasso's deposition was improperly admitted. When plaintiff sought to notice Hebe Hasso's deposition, defendant's trial counsel objected inter alia on the basis that she was in Lebanon. Plaintiff sought to introduce the objection to show that he was not responsible for Hebe's failure to testify, and to show that Hasso, through counsel, and not Hebe, had objected. Defendant characterizes the objection as an "ordinary" and "innocuous" pleading. But defendant's trial counsel was not the attorney of record for Hebe Hasso, and the court ruled, in light of the evidence of collusion among Hasso family members, that an action by Hasso's counsel on Hebe's behalf amounted to an admission against interest. The court made its observations about the Hasso family "conspiracy" in connection with its ruling on the objection to Hebe Hasso's

deposition, and we are unable to conclude that the ruling was erroneous in view of all of the circumstances the court identified at that time.

The next assertion is that plaintiff's counsel repeatedly and improperly referred to the length of the litigation as evidence of reprehensibility. The court permitted plaintiff's counsel, in closing argument, to contend that defendant had in effect perpetrated "11 years of fraud." Defense counsel did not object to this line of argument. We note also that plaintiff had conceded in opening argument that defendant had an "absolute right" to appeal from the first judgment, and "every right" to make the deposit to stay its execution. But the references to "11 years" in closing argument cannot in any event be fairly described as a form of improper comment on defendant's successful appeal. To quote again from the new trial ruling, the argument was based on evidence of "defendant's conduct since the first verdict in attempting to 'shelter' (and conceal?) his assets and his often deceitful testimony in explaining his post-trial conduct." The scope of permissible argument is a matter for the trial court's discretion (see generally 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 168, pp. 165-166 and authorities cited), and we find no abuse of discretion on this point.

Defendant's most strenuous objections are leveled at the testimony and argument involving defendant's unsuccessful motion to stay execution of the first judgment, the $2.5 million eventually deposited to stay execution and the motion to release those funds. Defendant argues that all of this evidence and commentary was improper, and that since the jury was apprised that a motion to withdraw the funds had been made, defendant should

have been allowed to show that it was made on the advice of counsel.

Although defendant has highlighted them, it appears that only three questions are asked with respect to the initial motion to stay execution, and they revealed only that the motion was made and denied. Those background facts were relevant because Hasso's "misstatements" under penalty of perjury were made in connection with this motion and, as indicated below, the bankruptcy court's finding with respect to the declarations was properly admitted.

It does not appear that the jury learned anything about the subsequent motion to withdraw the $2.5 million deposit except that it was made by Augusta Maidani and that it was unsuccessful. This limited evidence was appropriate to rebut the favorable inference Hasso had attempted to create by earlier testimony, repeated on at least three occasions, to the effect that the deposit had been made to "protect" plaintiff.

Hasso's professed concern for plaintiff was not credible in light of the circumstances outlined by the court when it remarked that Maidani's motion to release the funds, and Hasso's tacit participation in the motion, approached a fraud on the court. But the court rejected defendant's subsequent attempt to explain the motion in terms of advice of counsel because it was concerned about the prejudicial effect of evidence of the circumstances surrounding the motion. In view of the court's earlier comments, it is apparent that such evidence would have prejudiced defendant, not plaintiff, and hence that defendant was not disadvantaged by the ruling.

Turning finally to the deposit itself, it is true that the $2.5 million became a focus for much of the testimony, but the testimony was relevant to matters having nothing to do with defendant's right to stay execution. Hasso was examined about his efforts to raise this sum because those efforts involved properties that were the subject of the underlying dispute, and his testimony about the intra-family arrangements differed in a number of respects from the account he provided in his deposition. The deposit was relevant to the issue of net worth because Hasso claimed that the funds were community property. Interest on the deposit was also relevant, both to net worth and to Hasso's credibility, because it represented a substantial sum and Hasso could not account for it.

Accordingly, this is not a case like *Palmer v. Ted Stevens Honda, Inc., supra,* were litigation tactics were admitted into evidence even though they were wholly extraneous to matters properly before the jury. Most all of the evidence and argument to which defendant refers came in without objection, not because any objection would have been futile as defendant now claims, but because the argument was within the scope of the evidence, and the evidence was relevant to net worth or credibility or both. We find no error in connection with any of those matters.

C. Exclusion of Defendant's Offer to Pay $225,000

The trial court excluded evidence of defendant's pre-trial offer to pay plaintiff $225,000 out of the $2.5 million deposit as partial compensation for profits owed. Defendant states that the offer was the only potential factor in

mitigation he could cite apart from facts incident to the original fraud, and notes that its exclusion enabled plaintiff to argue that no payment had ever been made and defendant had not "taken one single step to do justice" over the course of 11 years. In these circumstances, defendant urges that the court's ruling under Evidence Code section 352 was a prejudicial abuse of discretion.

The court thought that defendant's offer was somewhat "illusory" because of possible claims against the deposit for unpaid taxes. Although the court's ruling occurred before commencement of trial, expressions of concern on this subject appear from beginning to end throughout the reporter's transcript. They stemmed from uncertainties about who had received interest on the money and whether any taxes on the interest were owed or paid. Defendant maintains that such concerns were themselves illusory because no tax liens were ever filed against the deposit, and the court authorized a withdrawal from the deposit to cover compensatory damages after the verdict was in. But the clerk of Court had evidently received notices from the taxing authorities, and county counsel was sufficiently concerned about them to file a motion for instructions during the course of trial. Concerns about unpaid taxes had not been dispelled when the court made its ruling on the offer, and they had not even been resolved by the time of the post-trial hearing when Augusta Maidani's counsel advised the court that the resolution "should go quickly."

In light of those concerns, the court could reasonably conclude that the probative value of the offer would be substantially outweighed by confusion and undue consumption of time in evaluating its merits. (See *Westside*

Community for Independent Living, Inc. v. Obledo (1983) 33 Cal.3d 348, 355 [no abuse of discretion where "reasonable basis for the action is shown"].) We also find defendant's claim of prejudice unpersuasive. The court stated that it would have permitted evidence of cash tendered outside the deposit and, as noted in the new trial ruling, defendant could have borrowed against the $1 million dowry but chose not to do so. It appears to us, as it appeared to the trial court, that the offer was "too little, too late."

D. Admission of Bankruptcy Court's Finding

Plaintiff was allowed to introduce, over objection, a finding of the bankruptcy court in connection with its dismissal of the bankruptcy petition filed by Hasso between the first and second trials. The finding was that the declaration Hasso submitted to stay execution in this case contained "various misstatements of fact with respect to the properties owned by the debtor, and the equity available for the Judgment Creditor Duggan." Defendant asserts that this evidence was only relevant to defendant's credibility and contends that admission of this finding was erroneous under Evidence Code section 878. Evidence Code section 787 provides that evidence of specific instances of conduct other than prior felony convictions that are "relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness."

The argument is made for the first time on appeal. The motion in limine to exclude this evidence cited Evidence Code section 352, and sections 402 and 403 relating to proof of preliminary and foundational facts. When the

matter was argued at trial, defense counsel again referred solely to Evidence Code section 352. Evidence Code section 353 provides that a judgment may not be reversed because of erroneous admission of evidence unless a timely objection is made, and "the admitted evidence should have been excluded on the ground stated." Defendant makes no attempt to justify exclusion of the bankruptcy court's finding on any of the grounds offered by his trial counsel. Accordingly, any error associated with admission of this evidence has effectively been waived.

We note in any event, however, that "evidence contradicting the testimony of a witness, even if it consists of proof of other wrongful acts, is proper if it is relevant to an issue in the case." (*People v. Clark* (1965) 63 Cal.2d 503, 505, fn. omitted; *People v. Knox* (1979) 95 Cal.App.3d 420, 434.) The misstatement in Hasso's declaration was failure to disclose a lien in favor of Hebe Hasso and, as the trial court noted in connection with its ruling, one of the issues in the case was Hasso's apparent use of interspousal transafers to try to defeat plaintiff's claim. We are therefore not persuaded that the bankruptcy court finding should have been excluded under Evidence Code section 787.

E. Excessive Punitive Damages

Defendant advances a number of arguments in support of the claim that the $2 million punitive damage award is excessive as a matter of law. Before turning to these arguments, we note that we may not reverse the award unless the record as a whole, viewed most favorably to the judgment, indicates that it was the result of

passion and prejudice. (*Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 927.)

(1) Defendant's Demeanor at Trial

Defendant contends that the award must be reversed because the jury would have been improperly influenced by his trial demeanor. Noting that defendant is an Iraqi who sometimes had difficulty expressing himself because he is not a native English speaker, and that he tended to be argumentative, his counsel speculates that the award may well have been the product of jury antipathy. Such considerations may lead to a finding of passion and prejudice in an appropriate case. (See, e.g., *Goshgarian v. George* (1984) 161 Cal.App.3d 1214, 1230.)

On appeal, we must be mindful of the fact that the trial court had an opportunity to observe defendant's demeanor over the course of two trials, and it found that the evidence justified a $2 million award. The principle that a new trial ruling on a punitive damage award is entitled to significant weight (see *Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 937), is especially important here, where we are called upon to assess the impression created by a witness we cannot observe. After a thorough review of the record, we conclude that to the extent the award was based on defendant's testimony, it resulted from what he said and not how he said it. Accordingly, we reject the argument based on defendant's trial demeanor.

(2) The Size of the Award

Defendant next contends that the award must be reversed because, in absolute terms, it "substantially

exceeds all other known awards against individuals that have been upheld." In this regard, defendant cites *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 868, where, in the course of reversing what it termed a "colossal" punitive damage award of $2,660,000 against an individual, the court remarked it was "aware of no case where even a six, let along seven figure punitive damage award against a private individual has been upheld, regardless of the reprehensibility of the conduct." (Ibid.) We interpret this language as a commentary on existing precedents, rather than expression of a rule that seven figure punitive damage awards against individuals are per se excessive.

But our own brief survey has in any event revealed that seven figure punitive damage awards against individuals are not unprecedented in California and, contrary to defendant's assertion, the award in this case is not the largest ever reported against an individual in this state. A $2 million punitive damage award against an individual for fraud in connection with a real estate transaction was upheld in *Ballou v. Master Properties No. 6* (1987) 189 Cal.App.3d 65, 75, where, although compensatory damages were only $138,000, the court concluded that "the award of punitive damages is not so disproportionate as to shock the conscience or to indicate that it was the result of passion and prejudice." (See also *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623 [affirming $1.5 million punitive damage award].)

Accordingly, we decline to rule that the award was excessive regardless of the reprehensibility of defendant's conduct.

(3) Excessiveness in Relation to Reprehensibility

Reprehensibility of the defendant's conduct is one of the factors to be considered in assessing punitive damages. (*Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 928.) Defendant argues that the only reprehensible conduct in this case was his fraudulent promise to pay plaintiff a portion of the profits from their original enterprise, and that the award greatly exceeds an amount appropriate to punish and deter that conduct. Appellant distinguishes cases like *Moore v. American United Life Ins. Co.,* (1984) 150 Cal.App.3d 610, where substantial punitive damage awards have been justified by a pattern of unethical conduct, by seeking to confine the fraud to a "single transaction."

This argument overlooks all of the evidence outlined in section I(C), *supra,* from which the jury could infer that defendant had engaged in a pattern of fraudulent conduct since the first trial by transferring and lying about his assets so as to avoid liability Defendant contends that this court "mandated" a retrial relating to "the conduct affirmed in the original appeal as fraudulent," but we did not grant defendant a license to misrepresent his net worth. The reply brief also notes that "even if misstatements were made by defendant at any point during the course of this lengthy litigation, respondent cites no authority for the proposition that those misstatements could support a larger award of punitive damages." Such conduct, however, falls within one or more statutory definitions of "deceit" (see Civ. Code, § 1710, subds. (1) [intentional misrepresentation], (2) [negligent misrepresentation], and (3) [concealment]), and there is no reason why deceit during the course of litigation should be

treated differently for purposes of punitive damages than any other form of fraud.

In light of the pattern of fraudulent conduct, we are unable to conclude that the award was excessive in relation to reprehensibility.

(4) Excessiveness in Relation to Net Worth

Defendant also asserts that the award represents an excessive share of his net worth. A defendant's wealth is an important consideration in assessing punitive damages (*Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc.*, (1984) 155 Cal.App.3d 381, 390), and an award is presumptively the result of passion and prejudice if it represents a disproportionate share of the defendant's net worth (see *Little v. Stuyvesant Life Ins. Co., supra,* 67 Cal.App.3d at p. 469). In this case, plaintiff maintains that the evidence would support a finding of net worth in excess of $20 million. Defendant responds that much of this evidence amounts to sheer speculation, that the $20 million figure improperly includes community property of Hebe Hasso, and that a new worth of no more than $4-5 million was established. We are thus called upon to review the evidence of defendant's wealth, and we must determine whether the community property of his ex-spouse is appropriately viewed as part of his net worth for purposes of punitive damages.

In *People ex rel. Department of Transportation v. Grocers Wholesale Company* (Sept. 29, 1989, A041658) ___ Cal.App.3d ___, we held that a plaintiff seeking punitive damages bears the burden of proof on the issue of the defendant's wealth. On the other hand, it is well-established that the prevailing party is entitled on appeal to the benefit of

every reasonable inference from the evidence. (See, e.g., *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429). In light of these principles, we find that the record supports an inference of wealth in excess of $12 million.

This figure includes: $2.5 million in profits from the parties' real estate ventures; the $2.5 million deposit to stay execution; the $2 million property in Lebanon allocated to Hasso in his settlement agreement with Hebe Hasso; $1.8 million received from Kodak in the 1970's (payments of $3.5 million less $1.7 million spent to purchase the properties involved in the lawsuit); $1 million received from Gillette in the 1970's; the $1 million dowry to Ruth Hasso; $900,000 derived from the Bloomington transaction; and $500,000 for antique furniture and persian rugs, for a total of $12.2 million. We will assume, for purposes of this appeal, that the evidence does not support the additional wealth of approximately $12 million claimed by plaintiff, consisting of: $4.8 million for the presumed "time value of money"; $4 million of property in Iran; $2 million of community property of Hebe Hasso in Lebanon; and an additional $1.1 million from the Bloomington transaction.

A portion of the $12 million represents community property of Hebe Hasso. Defendant argues that the jury should have been instructed to disregard all of such property because it makes no sense to punish and deter on the basis of wealth that is no longer owned. Whatever its merits in the abstract, the argument was properly rejected in this case, where the community benefitted from the fraud, a final division of marital property had not yet occurred, the property settlement was still in dispute, and there was evidence suggesting that the tentative allocation of community property was designed to

prevent plaintiff from collecting on the judgment. In these circumstances, the court was unwilling to rule as a matter of law that Hebe Hasso's community property could not be considered on the issue of net worth. The instructions were limited to general statements about community property liability and spousal reimbursement rights so that both sides could argue whether the "assets that appeared to have been conveyed to Hebe Hasso have genuinely been conveyed and are no longer within the reach of John Hasso for calculating his wealth." In closing argument, defense counsel urged the jury to find that "those assets are not going to be available to John Hasso." The issue was appropriately treated as one of fact.

The question, then, is whether the $2 million award, representing less than one-sixth of the defendant's net worth, must be viewed as excessive. In *Grocers Wholesale, supra,* we cited a survey of punitive damage awards appended to *Devlin, supra,* 155 Cal.App.3d at pp. 393-396, suggesting that such awards are generally not allowed to exceed 10 percent of net worth, and we determined that the conduct in *Grocers Wholesale* did not justify imposition of an award in excess of that percentage. But each case must be decided on its own facts and this case, unlike *Grocers Wholesale,* does not involve a single misrepresentation. The jury implicitly determined, and the court expressly found, that the evidence revealed a pattern of continuing misrepresentation designed to defeat plaintiff's claim. The award, moreover, is less than the profit generated by the original fraud. (See Civ. Code, § 3295, subd. (a)(1) [profits from wrongful conduct relevant to assessment of punitive damages]; and *Wyatt v. Union Mortgage Co.,* (1979) 24 Cal.3d 733, 791 [upholding award that was "less than the income directly generated by

appellants' wrongful conduct"].) We conclude in light of these considerations that the reduced award is not excessive in relation to defendant's net worth.

F. Jury Instruction on Burden of Proof of Net Worth

A final issue has arisen after the close of briefing by virtue of our decision in *Grocers Wholesale*. In that case, we noted the conflict between *Vossler v. Richards Manufacturing Co.* (1983) 143 Cal.App.3d 952, 961-965 [defendant bears burden of producing evidence of its wealth for purposes of punitive damages]), and the recent decision in *Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1267-1269 [plaintiff bears burden of proof on issue of defendant's net worth], and we determined that *Dumas* sets forth the better rule. Accordingly, we remanded for a new trial on punitive damages against a defendant in *Grocers Wholesale* because no evidence of its net worth had been presented.

A substantial amount of evidence was presented with respect to defendant's net worth in this case, but the jury was instructed on the basis of *Vossler* that the "defendant has the burden of proof of establishing all of the facts necessary to establish his inability to pay a given amount of punitive damages." We find that this instruction was erroneous for the reasons stated in *Dumas* and *Grocers Wholesale*. Defendant, however, did not object to it, and "[t]he failure to object to an instruction relieves an appellate court of the obligation to review claimed error therein. [Citation.]" (*Wilkinson v. Bay Shore Lumber Co.* (1986) 182 Cal.App.3d 594, 599.)

Assuming arguendo that the point had not been waived, the remaining question would be whether this

error was prejudicial. "A judgment may not be set aside on the ground the jury was misdirected unless a reviewing court, after an examination of the entire cause, including the evidence, shall be of the opinion that the error resulted in a miscarriage of justice." (*Wilkinson, supra,* at p. 599.) It must appear " 'probable that the jury's verdict may have been based on the erroneous instruction . . . .' [Citations.]" (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 875.)

The error in this case was exacerbated by plaintiff's counsel's comments on the burden of proof during closing argument. But another factor to be considered in weighing the effect of an erroneous instruction is the "closeness of the jury's verdict" (*LeMons, supra,* 21 Cal.3d at p. 876), and it is clear from the very brief deliberation leading to the unanimous verdict that this was not at all a close case in the jury's mind. Looking back at the trial as a whole, we do not believe that the single erroneous instruction turned this lengthy and otherwise error-free proceeding into a "miscarriage of justice," and it does not appear "probable" to us that a different verdict would have resulted from a different instruction. We thus would not be inclined to rule that the instruction was prejudicial even if the error had not been waived.

III. DISPOSITION

The judgment and the conditional order granting a new trial are affirmed. The parties shall bear their own costs on appeal.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION: 4

DUGGAN, CHARLES A.
vs.
HASSO, JOHN, ET AL.
A042843 Old No. A019074
Napa County No. 39856

FILED
DEC 28 1989

BY THE COURT:

The petition for rehearing is denied.

Dated: DEC 28 1989

/s/ Anderson P.J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division Four,
No. A042843
S013644
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

FILED
FEB 14 1990

CHARLES A. DUGGAN, Respondent

v.

JOHN HASSO Et Al., Appellants

Appellants' petition for review DENIED.

LUCAS
Chief Justice

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR

CHARLES A. DUGGAN
v.
JOHN HASSO et al.

A042843
Napa County
Sup. Ct. No. 39856

BY THE COURT:

The motion of appellants John Hasso et al. for stay of issuance of the remittitur is granted. It is hereby ordered that issuance and transmission of the remittitur be stayed to and including May 15, 1990, and if on or before that date appellants file a petition for writ of certiorari in the United States Supreme Court, then the remittitur of this court shall be stayed until after the U.S. Supreme Court has passed upon that petition.

Dated: MAR 23 1990

ANDERSON, P.J. P.J.

No. S013644

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CHARLES A. DUGGAN, Respondent

v.

JOHN HASSO et al., Appellants

FILED
APR 10 1990

Petition for review and request for stay denied.

LUCAS
Chief Justice

No. 89-1796 (2)

IN THE

Supreme Court of the United States

October Term, 1989

JOHN HASSO, ELISSA N.V., RUMBA, N.V., PACIFIC MIDLAND N.V., KONDOLAND CORP. AND GRAPE CAPITOL CORP.,

Petitioners,

v.

CHARLES A. DUGGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT, DIVISION FOUR

RESPONDENT'S BRIEF IN OPPOSITION

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Attorney for Respondent

QUESTIONS PRESENTED

1. Whether the ordinary evidentiary rulings by the Trial Judge raise Federal Questions invoking this Court's jurisdiction, since Hasso asks this Court to weigh evidence on the reprehensibility of his fraudulent conduct, an issue of fact in the case.

2. Whether Hasso has failed to preserve and therefore has waived a Federal Due Process challenge to evidentiary rulings of the Trial Judge, since he did not press a federal due process challenge in the courts below and therefore the Court of Appeal did not pass on his challenge.

3. Regarding the exclusion of four pieces of so-called mitigating evidence, whether the application of (i) *Res Judicata* (California Code of Civil Procedure § 1908(a)), (ii) the California Rule of Evidence prohibiting admission of irrelevant evidence (Evidence Code § 350) and (iii) the California Rule of Evidence empowering a trial judge to exclude prejudicial evidence having only slight probative value (Evidence Code § 352) constitutes an independent and adequate state ground for the Judgment, thereby making review of this case on Federal due process grounds inappropriate.

4. Regarding the admission of so-called litigation conduct evidence, whether (i) Petitioner's failure to object in the trial court and thereby preserve his right to claim error under California law and (ii) the relevance and admissibility of the evidence on issues separate from the issue of reprehensibility constitute independent and adequate state grounds for the judgment, thereby making review of this case on Federal due process grounds inappropriate.

5. Whether this Court's recent decision in *Browning-Ferris* declining to craft common-law standards of excessiveness that rely on notions of proportionality makes it inappropriate to accept Hasso's invitation to do that very thing in this state case, in derogation of the distinction between state law and federal law issues.

TABLE OF CONTENTS

LIST OF APPENDICES[1]

[1] For the Court's convenience and ease of reference, Respondent's Appendices attached to this Opposition Brief begin at "APPENDIX G" as an extension of the appendices lettering sequence used by Petitioner.

TABLE OF AUTHORITIES

No. 89-1796

IN THE

Supreme Court of the United States

October Term, 1989

JOHN HASSO, ELISSA N.V., RUMBA, N.V., PACIFIC MIDLAND N.V., KONDOLAND CORP. AND GRAPE CAPITOL CORP.,

Petitioners,

v.

CHARLES A. DUGGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT, DIVISION FOUR

RESPONDENT'S BRIEF IN OPPOSITION

OPPOSITION TO PETITION

Respondent Charles Duggan respectfully asks this Court to deny John Hasso's Petition for Writ of Certiorari to review the final judgment of the California Court of Appeal, First Appellate District, Division Four.

JURISDICTION

None of the federal due process questions now described by Hasso were properly pressed or passed upon in the California courts. Furthermore, Hasso did not comply with the

mandate of Rule 14.1(h), United States Supreme Court Rules. He failed both to "specify" the "way in which the [federal questions] were passed upon" by the Napa Superior Court and the California Court of Appeal and to make "specific reference to the places in the record . . . " where each federal question was raised, "as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari."

Respondent Duggan objects to the preamble to the Questions Presented in the Petition on the ground it violates Rule 14.1(a) which mandates that "no other information" shall appear on the Questions Presented page.

Hasso relies on Rule 10.1(c) to establish the discretionary jurisdiction of this Court to grant his petition. Duggan asserts that the ordinary evidentiary rulings of the trial judge do not constitute either (i) "an important question of federal law" which should be settled by this Court or (ii) a federal question that conflicts with applicable decisions of this Court.

Respondent objects to Question Presented No. 1 on the ground that it characterizes as "mitigating" certain evidence excluded in the 1988 trial. This is misleading, since the four discrete pieces of evidence referred to by Hasso were found by the jury in the 1982 liability trial and by the trial judge and by the Court of Appeal in the 1988 trial *not* to mitigate Hasso's fraudulent conduct.

Respondent objects to Question Presented No. 2 on the ground that there is no evidence and no rational basis in the record for concluding that the jury award of punitive damages was based upon Hasso's exercise of "constitutional and statutory rights of appeal . . . and for taking legal steps to prevent execution on the judgment pending the appeal." Duggan told the jury in Opening Statement that Hasso had an "absolute" right to appeal and to stay execution by posting a bond or deposit. (See App. B to Pet., p. B22) The record is clear that the jury awarded punitive damages based upon Hasso's original intentional fraud on Respondent Duggan and Hasso's "pattern of fraudulent conduct since the first trial by transfer-

ring and lying about his assets so as to avoid liability." (App. B to Pet., p. B30)

Respondent objects to Question Presented No. 3 on two separate grounds. First, the question of whether a punitive damage award is "excessive" or "disproportionate" based upon an application of state legal standards to the unique facts of a state court case was declared to be outside the jurisdiction of this Court in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989) at p. 2922. Second, petitioner makes an obscure reference to "available post-trial and appellate review" procedures in California, apparently intending to challenge the procedural safeguards afforded by the extensive and time-tested statutory scheme in California both for new trial motions and for appeal.[2] After more than 12 years of litigation, this is the very first time Hasso has even insinuated that he challenges these extensive statutory provisions. There was no notification to the Attorney General of California as required by Rule 29.4(c). There was no specification to the record of where challenges to these statutes were raised below, as required by Rule 14.1(h). In addition, Hasso has failed to comply with Rule 14.1(f) by setting out "verbatim" the California "constitutional provisions . . . [and] statutes . . . involved in the case. . . . "

Finally, Respondent Duggan objects to the Petition on the ground that Hasso may not invoke the jurisdiction of this Court in view of his failure to comply with Rule 14.5. Hasso failed to present "with accuracy . . . and clearness" the materials and argument "essential to a ready and adequate understanding of the points. . . . " in the following particulars. First, in Question Presented No. 1, Hasso urges this Court to define what evidence *must* be admitted in every punitive damage case in all fifty states, without explaining how this is even possible when each state court case turns on its own unique facts and without proposing rational guidelines which are well-grounded in the policies of federal-state comity. Second, in Question Presented No. 2, Hasso urges this Court

[2] See, e.g., California Constitution, Article 6, §§ 11-12, 13; California Code of Civil Procedure §§ 901-936.1.

to define what evidence *must* be excluded from a jury assessing punitive damages, without explaining *how* this is possible when each state court case turns on its own unique facts and without proposing rational guidelines which comport with the policies underlying federal-state comity concerns. Finally, Petitioner's principal arguments set forth in the text of the Petition at pp. 12-21 fail to address the threshold and pivotal question of whether the so-called mitigating evidence was even relevant in the first place, and if so whether the probative value of such evidence was slight and substantially outweighed by the prejudicial effect of its admission.

STATEMENT OF THE CASE

This case turned on its own unique facts.

In this case a unanimous 12-member jury in Napa Superior Court, Napa, California, found that petitioner John Hasso committed intentional fraud. The nature of the fraud was a knowingly false promise by Hasso to share profits in a common real estate business venture with respondent Charles Duggan involving eight properties principally located in the Napa Valley Wine Country. The false promise occurred in the spring of 1977.

This case has been tried twice with The Honorable Philip A. Champlin presiding as trial judge at both trials. The complaint was filed on December 21, 1978. The first trial commenced in the spring of 1982. A unanimous jury found that Hasso committed intentional fraud and awarded Duggan compensatory damages in the amount of $541,359 and punitive damages in the sum of $1,101,549.75. Hasso made a Motion for New Trial which was denied. Hasso appealed.

The appeal was decided on September 29, 1986. The Opinion and Judgment of the California Court of Appeal affirmed the judgment as to liability for compensatory and punitive fraud damages but reversed for recalculation of the amount of damages. The second trial to calculate damages commenced in the spring of 1988. By general verdict, a

unanimous jury awarded Duggan compensatory damages in the sum of $483,584 and by special verdict assessed punitive damages against Hasso and his corporations in the sum of $3 million. Hasso did not request that the jury make any special findings of fact. John Hasso made a Motion for New Trial, asserting three grounds. Two of the grounds related to claims that certain so-called mitigating evidence had been improperly excluded by Judge Champlin and other evidence had been improperly admitted on the issue of his reprehensibility. On these grounds the Motion for New Trial was denied.

The third ground of the Motion was that the punitive damages were excessive as a matter of law, based upon the three standards employed in California for awarding the amount of and measuring the propriety of punitive damages. Those standards are described in *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910 and include (i) the reprehensibility of defendant's conduct, (ii) the amount necessary to punish and deter the defendant in light of his wealth, and (iii) a requirement that the relationship between compensatory damages and punitive damages be reasonable. Judge Champlin made a conditional order granting the new trial unless Duggan agreed to a remittitur of the punitive damages from $3 million to $2 million. Duggan agreed to the remittitur. Hasso appealed the $2 million punitive damage award. After the 1988 trial Duggan's motion in the trial court was granted for disbursement of compensatory damages, and those damages were paid in the summer of 1988, 11 years after the fraud.

On Hasso's appeal, the Court of Appeal affirmed the judgment for punitive damages. The Opinion[3] of the Court of Appeal is unpublished and will not be used as legal precedent. In Hasso's Appellant's Opening Brief, he made no reference to "due process" or to the "Fourteenth Amendment" or to the "U. S. Constitution." He made no reference to the due process clause in the California Constitution at

[3] Attached as Appendix R is a copy of the signature page of the Opinion, omitted in Appendix B to the Petition. Justice Perley wrote the opinion for a unanimous Court, joined by Justices Anderson (P.J.) and Channell.

Article 1, §§ 7, 15. He never gave the Court of Appeal an opportunity to pass on his claims under the California due process clause. After briefing and oral argument were concluded, the matter was deemed submitted. The Court of Appeal rendered its appellate Opinion and Judgment on November 30, 1989.

John Hasso filed a Petition for Rehearing in the Court of Appeal. For the first time, John Hasso asserted that his federal "due process" rights had been violated. The Petition for Rehearing was denied without comment. (App. C to Pet.) Hasso then filed a Petition for Review in the California Supreme Court, based exclusively on the claim that his federal due process rights had been violated by the evidentiary rulings of the trial judge. A full copy of Hasso's Petition for Review in the California Supreme Court is attached as Appendix K. In that Petition for Review, Hasso acknowledged that he had not raised any "due process" argument or claims until his Petition for Rehearing in the Court of Appeal (App. K, p. K7). The claims of due process violation described and asserted in Hasso's Petition for Review in the California Supreme Court are the same claims now asserted in the Petition in this Court. The Petition for Review was denied *en banc* by a unanimous California Supreme Court. At least one reason why the California Supreme Court rejected John Hasso's federal due process claims was Hasso's failure to raise those claims in his appeal before the Court of Appeal.[4] See California Rule of Court 29(b)(1) which states the policy of the California Supreme Court not to review issues that could have been but were not timely raised in the Court of Appeal. This case is now in its twelfth year.

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[4] The Court held in *Jenner v. City Council* (1958) 164 Cal.App.2d 409 at p. 498 that constitutional objections are waived unless raised at the earliest opportunity. In his Petition for Review, Hasso asserted that the California Supreme Court created an exception to the *Jenner* rule in the case of *Hale v. Morgan* (1978) 22 Cal.3d 388 which applied to this case. (See App. K, p. K7.) The California Supreme Court rejected Hasso's argument that the *Jenner* rule did not apply to this case. One of several noteworthy distinctions in the *Hale* case is that the appellant did in fact raise his constitutional challenge in the Court of Appeal in a timely and proper manner, in contrast to Hasso's failure to do so in this case.

A. Deposit To Stay Execution

Hasso procured his mother-in-law, Augusta Maidani, to deposit $2.5 million into the Napa Superior Court to stay enforcement of the judgment. (CT 111) Augusta Maidani represented that the $2.5 million was her money. On retrial in 1988, John Hasso under oath said that the $2.5 million was his money. (RT 1125:2-5) In 1987 Augusta Maidani made a motion to withdraw the $2.5 million deposit. That motion was denied by Judge Champlin. John Hasso's attorney filed a Petition for Writ of Mandate, asking the Court of Appeal to order the Napa Superior Court to release the $2.5 million deposit. That petition was denied.

At the 1988 trial, Judge Champlin remarked that Augusta Maidani had perpetrated a fraud on the Napa Superior Court in connection with the $2.5 million deposit and that John Hasso must have been a party to that fraud. (See App. O) Hasso testified that it was "correct" that he attempted to withdraw the $2.5 million Deposit in 1987 for the purpose of defeating "plaintiff's claim." (RT 1228BC:28-1228BD:6)

B. Disposition Of Hasso's Assets Between 1982 Trial And 1988 Trial.

As noted by the Court of Appeal, there was substantial evidence at the 1982 trial that John Hasso's wealth exceeded $10 million. (App. B to Pet., p. B3)

Hasso testified at the 1988 Trial that he had transferred essentially all of the "liquid" and "valuable" community property assets to his first wife Hebe Hasso during the time period between the 1982 Trial and the 1988 retrial. (RT 1228AX:11-26)

When Hasso married his second wife Ruth Hasso on or about July 2, 1987, he transferred to her what were essentially the "valuable" and "liquid" properties that he had left in the United States. These three properties were worth $1 million (RT 1095:12-28).

At deposition just before the 1988 Trial, Hasso testified that his net worth consisted only of approximately $50,000

in cash and some notes, not including the Iran assets and assets disputed with his first wife Hebe Hasso (RT 1228AO:24-1228AP:9).

Judge Champlin concluded there was a Hasso family "conspiracy" in connection with the diversion and concealment of assets. (See App. B to Pet., p. B8, and Appendix O.)

C. 1988 Retrial To Calculate Damages

Fraud liability for both compensatory and punitive damages had been established by the Opinion and Judgment of the Court of Appeal after the first trial. That became the Law of the Case. The issues on retrial in calendar year 1988 included a calculation of compensatory damages based upon the profit from the sale of the eight properties. On the calculation of punitive damages, the issues included (a) the reprehensibility of Hasso's conduct, (b) the amount of punitive damages necessary to punish and deter in light of his wealth as of trial in 1988, and (c) his credibility.

At the beginning of the trial, there was considerable *in limine* argument with regard to the scope of the evidence. Judge Champlin concluded that on the issue of fraud liability, the parties would not be permitted to relitigate issues of fact which had been conclusively determined at the first trial and fell within the doctrine of Res Judicata, as codified in California Civil Code § 1908(a).[5] (See Appendix P) In order to apprise the second jury of the facts and transactions relating to the basic fraud, the Court read a comprehensive Statement of Facts to the second jury, at the beginning of the trial (reproduced as Appendix I).

The Statement Of Facts was proposed by Hasso himself, adopted in large part by the Trial Court, and derived from the Court of Appeal Opinion. Prior to trial, John Gulick as Defense Counsel for Hasso submitted a pleading called Defendant's Proposed Factual Statement To Be Read Into

[5] One of Judge Champlin's many concerns was that Hasso might attempt to relitigate the issue of liability by putting in evidence and arguing that "it was just a little fraud" or "just a mistake" or "no fraud at all." (See App. B to Pet., p. B16)

The Record (CT 883-893) (reproduced as Appendix J). In that document, Hasso's attorney states:

> "Thus, *to avoid error and to be fair to the parties*, Defendant submit that the Court of Appeal decision and recitation of the facts in the opinion should be adopted by the Trial Court *as a error proof statement of what the record shows with respect to factual determinations. To permit the parties to argue the findings of other facts would be contrary to the doctrine of collateral estoppel.*" (Emphasis added) (CT 883-884)

Accordingly, Hasso himself proposed that the Statement of Facts be read to the jury as a matter of fairness to the parties and to avoid violation of the doctrine of *Res Judicata*[6] (collateral estoppel). Hasso is not permitted to urge the adoption of a procedure in the trial court, only to claim later on that the procedure constituted prejudicial error and violated his federal due process rights. See *Weiner v. Mitchell Silberberg & Knupp* (1980) 114 Cal.App.3d 39.

Hasso argued that there were four pieces of so-called "mitigating" evidence relating to the original fraud which should be placed before the jury. Both the trial court (See App. P) and the Court of Appeal determined that this so-called mitigating evidence was not relevant because it did not have "any bearing on Hasso's false promise" to share profits with Duggan. (App. B to Pet., p. B17) (See Appendix Q) California Evidence Code § 210 defines "relevant evidence" as evidence "having any tendency in reason to prove or disprove any disputed fact. . . ." Judge Champlin and the Court of Appeal concluded that Hasso's so-called "mitigating" evidence did not have any tendency in reason "to disprove" or "to mitigate" the reprehensibility of his fraudulent conduct.

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[6] The California Supreme Court states the purposes of *Res Judicata* in *People v. Taylor* (1974) 12 Cal.3d 686 at p. 695: "We deem the purposes of an application of the doctrine [*Res Judicata*] to be: (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harrassed by vexatious litigation."

D. Calculation of Profit[7]

There was no dispute at the 1988 trial that all eight properties had been sold. Nor was there any dispute as to the gross sales price for each of the properties or that the profit was $3,367,284 (rounded to $3.3 million).

E. Net Worth Of Hasso And His Corporations

Plaintiff urged at trial that Hasso's net worth was over $20 million. Judge Champlin as trial judge found in ruling on the Motion for New Trial that Hasso's net worth is "probably less than $20 million." (App. A to Pet., p. A7)

Both the trial judge in ruling on the Motion for New Trial (App. A to Pet., p. A7) and the Court of Appeal in affirming the punitive damage judgment (App. B to Pet., p. B3) stated that John Hasso's wealth as of the *1982 trial*, six years earlier, was "in excess of $10 million." If the time value of money is to be considered, carrying $10 million forward from the 1982 trial to the 1988 trial at 10% annual compounded interest increases the $10 million to an amount in excess of $17 million. The Court of Appeal stated that Hasso's wealth was $12.2 million as of the 1988 trial (App. B to Pet., p. B32).

Judge Champlin stated in his ruling on the Motion for New Trial:

> "The defendant has lied so many times about his assets that it is truly impossible to know the full measure of his wealth." (App. A to Pet., p. A6)

F. Judge Champlin's View Of Hasso's Conduct[8]

Contrary to Hasso's misleading impression, Judge Champlin thought the evidence of Hasso's fraud and his misconduct

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[7] In California the amount of profit gained by the wrongdoer from his fraudulent conduct is highly relevant to a calculation of the amount of punitive damages necessary to punish and deter. See California Civil Code § 3295 (a) (1) and *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 733, 791.

[8] Hasso asserts (Petition, p. 6) that Justice Poche in his dissent on the appeal from the 1982 trial concluded that there was "scant evidence" of Hasso's intention to defraud Duggan. That is a gross and misleading misrepresentation of Justice Poche's remark. Justice Poche said there was scant evidence of Hasso's intention *to seek out unlicensed business partners*. There is a considerable difference. Justice Poche's predominant concern in his dissent related to licensure issues which are not implicated in Hasso's Petition before this Court. In any event, the majority of the Court affirmed the judgment as to Hasso's liability and that judgment became final over three years ago in 1986.

was compelling, not "thin."[9] In his ruling on the Motion for New Trial, Judge Champlin made it clear that his remarks during the 1982 trial regarding "thin" evidence of fraud were made "in an effort to encourage the parties to settle" and in any event were made "prior to completion of the case and argument of counsel." (App. A to Pet., p. A4) The Court went on to state that it concluded there was "substantial evidence" upon which the jury based its finding of fraud and that the Court of Appeal agreed.

The Trial Court felt it appropriate and necessary to comment on the "totality of the facts and the circumstances in this case including the original fraud, and the defendant's compounding conduct during the last several years, *all of which have been an affront to the court system and this community's sense of fair business practices.*" (Emphasis added) (CT 1405) (App. A to Pet., p. A8).

Specifically, the Trial Court made reference to John Hasso's "*conduct since the first verdict in attempting to shelter (and conceal?) his assets and his often deceitful testimony in explaining his post-trial conduct.*" (Emphasis added) (CT 1400) (App. A to Pet., p. A2).

In addition, the Trial Court felt compelled to state that "*the defendant has compounded his original fraud by weaving a web of deceit regarding his assets* in which he became entangled during the second trial." (Emphasis added) (CT 1403) (App. A to Pet., p. A5).

The Trial Court made a specific finding that *John Hasso "committed perjury."* The Trial Court stated in the Notice Of Decision:

> "To put it bluntly, the Defendant has no credibility and, in this Court's opinion, has committed perjury

[9] In his Petition at p. 5, Hasso states that Judge Champlin stated he "disagreed with the verdict." That is not true. Judge Champlin never made any such statement either expressly or by implication. If he had, this Court can be assured that Hasso would have directed its attention to a specific quote in the record below. Hasso did not because there is no such record. The same misleading information is stated by Hasso p. 7 of his Petition that the Statement read to the jury omitted facts which Judge Champlin and the Court of Appeal "had found in Hasso's favor . . . ." That is flatly untrue. Judge Champlin and the Court of Appeal found any so-called "mitigating" facts irrelevant to the issues tried by the second jury.

during these proceedings. . . . The Defendant gives the impression of a man who will say anything if it benefits him whether under oath or not and whether true or not. He gave this impression during the first trial and has reinforced it during the second trial. It is obvious that two juries, by a unanimous vote each time, have reacted to Defendant similarly." (CT 1403) (App. A to Pet., p. A5).

REASONS FOR DENYING THE WRIT

The Petition should be denied, because there are independent and adequate State grounds to support the Judgment. With respect to the evidence excluded by Judge Champlin at trial, he based his decision on three legal principles: the doctrine of *Res Judicata*, the rule that only relevant evidence is admissible, and under California Evidence Code § 352 and the rule of evidence empowering a trial judge to exclude prejudicial evidence that has slight probative value.

With respect to the admitted evidence of which Hasso complains, in most respects he waived any objection by his failure to make a timely and proper objection stating the grounds of the objection under California Evidence Code § 353. Furthermore, the evidence was admissible anyway on issues separate and apart from the issue of Hasso's reprehensibility. Therefore, that evidence would have come into the case in any event.

I.

THIS PETITION INVOLVES ONLY ORDINARY EVIDENTIARY RULINGS OF THE TRIAL JUDGE AND CANNOT RAISE A CONSTITUTIONAL CHALLENGE EITHER TO THE CALIFORNIA STATUTE ESTABLISHING THE GROUNDS OF LIABILITY FOR PUNITIVE DAMAGES OR TO CALIFORNIA COMMON LAW STANDARDS FOR CALCULATING THE AMOUNT OF PUNITIVE DAMAGES.

California Civil Code § 3294 provides that in actions not arising out of a breach of contract, punitive damages may be

assessed against a defendant who has been found guilty of "oppression, fraud or malice." Hasso's Petition does not challenge the constitutionality of this statute.[10]

The three standards to be employed by a jury in calculating the proper amount of punitive damages "to punish wrongdoers and thereby deter the commission of wrongful acts" are set forth by the California Supreme Court in *Neal, supra*, at p. 928. For approximately fifty years, California trial courts have commonly used the Book of Approved Jury Instructions known as "BAJI."[11] BAJI 14.71 instructs a jury that in awarding punitive damages, it must consider (1) the reprehensibility of defendant's conduct, (2) the amount of punitive damages which will have a deterrent effect on the defendant in light of his financial condition, and (3) that the punitive damages must bear a reasonable relationship to the actual damages.

At the 1988 Trial, Hasso was represented by attorney John Gulick. Mr. Gulick proposed that the Court instruct the jury using a modified BAJI 14.71, requiring the jury to employ the three *Neal* standards in calculating the amount of punitive damages. The Court in fact adopted Mr. Gulick's proposed jury instruction and gave Mr. Gulick's 14.71 as part of the instructions on the law. During discussion between counsel and Court as to which jury instructions would be given, Judge Champlin stated:

> "...I took your version of 14.71, Mr. Gulick...."[12]

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[10] In any event, it would be too late for John Hasso to do so. The 1982 jury found that John Hasso had committed intentional fraud and his *liability* for compensatory and punitive fraud damages became final and non-reviewable at the conclusion of Hasso's appeal from the 1982 trial, in 1986. While the calculation of the *amount* of punitive damages did not survive Hasso's first appeal, his *liability* for punitive damages was established and became part of the Law of the Case, binding on the parties at retrial in 1988. *Lindsey v. Meyer* (1981) 125 C.A.3d 536, 541. Furthermore, there is no evidence Hasso complied with Rule 29.4(c), noticing the Attorney General of California that he challenges California Civil Code § 3294.

[11] California Jury Instructions, Civil, West Publishing Company (7th edition, 1986).

[12] RT 2203:4 to 2204:1. Attached as Appendix G. The actual jury instruction submitted by Hasso is reproduced as Appendix H.

The California Supreme Court has made it clear that if a party proposes a jury instruction, he waives any error or irregularity in that instruction. The California Supreme Court states in *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40 at p. 50:

> "It is well settled that a party cannot attack the substance of an instruction if he himself proposed similar instructions."

Furthermore, Hasso never challenged BAJI 14.71 in the earlier 1982 trial, where the same instruction as to calculation of punitive damages had been given.

In a confusing preamble to the Questions Presented in the Petition, Hasso appears to invite this Court to review the Judgment in this case on the ground that the Napa Superior Court jury had "unbridled discretion" to award punitive damages against Hasso and therefore the award is unconstitutional. However, Hasso has waived any "due process" challenge to the BAJI 14.71 instruction given to the jury by proposing the instruction himself. Therefore, Hasso waived any due process concerns involving the relationship between net worth or actual damages and punitive damages and the use of reprehensibility as one of the standards by which punitive damages are calculated.

Simply, this case involves "ordinary evidentiary rulings" by a California Superior Court trial judge, and nothing more.

This is a lawsuit between private parties. There is no state or federal government entity prosecuting or defending this case. There is no insurance company involved. There is no business or industry involved, raising the spectre that this punitive damage award may be passed through to the consuming public or that industry research and development of new products will be discouraged.

The punitive damage assessment of $2 million in this case simply requires Hasso to disgorge a portion of the profits he gained by his fraudulent conduct.

II.

HASSO FAILED TO RAISE AND PRESERVE FEDERAL DUE PROCESS OBJECTIONS TO THE EVIDENTIARY RULINGS OF THE TRIAL JUDGE AND THEREFORE WAIVED THEM AND THE COURT OF APPEAL DID NOT PASS ON HIS DUE PROCESS CLAIMS.

Hasso raised the same federal due process claims in his Petition for Review before the California Supreme Court (attached as Appendix K). Hasso's Petition for Review was denied *en banc* by a unanimous California Supreme Court. In that Petition for Review, Hasso admitted that he did not raise the "due process" argument until his Petition for Rehearing in the Court of Appeal[13] (App. K, p. K7). He states:

> "Preliminarily, while due process may have been mentioned explicitly for the first time on Hasso's Petition for Rehearing (App. A), he amply preserved both of the procedural points urged here. He argued, for example, that the various rulings 'effectively deprived defendant of a fair trial on punitive damages' (AOB 41) and 'violated settled law protecting a litigant's right to defend himself. . . .' (AOB 45)."

In California, issues must be raised and discussed in Appellant's Opening Brief. Hasso did not raise "federal due process" in his Opening Brief. Raising new matters in Appellant's Reply Brief is too late. The Court states the rule in *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623 at page 641:

> "New matters cannot be raised for the first time in a reply brief."

Hasso purported to *first* raise the issue of due process in the Petition For Rehearing. But that also is too late.

Very recently this Court, in a *California case*, made it clear that if Petitioner raises his "federal question" for the

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[13] Under California procedure, an appellant files an Appellant's Opening Brief. Respondent files a Respondent's Brief. Appellant is then afforded an opportunity to file an Appellant's Reply Brief. Oral argument is then set, and at the conclusion of oral argument the matter is deemed submitted for decision. When the Court of Appeal decides the case, it distributes the written Opinion and Judgment to the parties. At that time, either party may file a Petition for Rehearing.

first time in his Petition For Rehearing in the state court, that is too late. In the case of *Board of Directors of Rotary International v. Rotary Club of Duarte*, 48 U.S. 537, 550 (1987), this Court states at page 550:

> "Appellants did not present the issues squarely to the [California] State Court until they filed their Petition For Rehearing with the Court of Appeal. The Court denied the Petition without opinion. When 'the highest state Court has failed to pass upon a federal question, it will be deemed that the omission was due to want of proper presentation in the State Courts, unless the aggrieved party in this Court can affirmatively show the contrary.' (Multiple cases)"

In his Petition, Hasso states at p. 11:

> "The trial court acknowledged that Hasso's objections to the exclusion of evidence on the issue of reprehensibility were grounded in his due process right to defend himself. [RT 853:17-22]."

That is a remarkable attribution to Judge Champlin. He said nothing of the sort. His remarks at that point in the Reporter's Transcript are as follows:

> "But you got a whole different case. And I don't, you know, you've got a finding of fraud, a finding of liability. That's true. But I don't think I can artificially paint Mr. Hasso into a corner in this case and allow this case to be re-tried so that he's got both hands tied behind his back. He's sorta got one hand tied behind his back because of the fraud finding."

By no stretch of the imagination does this remark refer to "due process." This was all in the context of an in limine discussion outside the presence of the jury at the beginning of the case. (See App. Q) When the admissibility of the specific evidence later came up, Judge Champlin ruled that the four pieces of evidence were irrelevant. (See App. P)

At page 11 of the Petition Hasso goes on to state that he argued in his motion for new trial and in the Appellant's Opening Brief that the exclusion of mitigating evidence "vio-

lated fundamental due process." In point of fact, no such reference to "due process" appears anywhere in Appellant's Opening Brief. Perhaps that is why Hasso failed to comply with the mandate of Rule 14.1(h) to make "specific reference to the places in the record where the matter appears."

Raising the matter in a Motion for New Trial is too late, since it is after the close of evidence and entry of the verdict, and after the jury has been discharged and judgment entered in the case. At that point it is too late for the trial court to evaluate the merit of a "federal due process" argument and therefore too late to take corrective action.

It is correct that in his Appellant's Opening Brief, he stated that he had been deprived of a "fair trial" on punitive damages and that he was denied the right "to defend himself." But what does that mean? It certainly did not put the Court of Appeal on any notice that it should consider and "pass on" a "federal due process" argument under the Fourteenth Amendment to the United States Constitution. This Court will note that the Opinion of the Court of Appeal makes absolutely *no reference whatsoever* to "due process" or the "Fourteenth Amendment" or the "U. S. Constitution." Hasso utterly failed to bring any federal due process argument "squarely" to the attention to the Court of Appeal in a proper and timely manner. (App. B to Pet.)

Webb v. Webb, 451 U.S. 493 (1981), is right on point.

This Court states at page 499:

> "It is appropriate to emphasize again (case) that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts *only where the record clearly shows that the federal issue has been properly raised below*. . . .

* * *

> . . . Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on State authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements." (Emphasis added)

Finally, the two cases cited by Hasso at page 11 of the Petition are of no help to Hasso. In *Taylor v. Illinois*, 484 U.S. 400 (1988), the petitioner had cited case authority in the state court in which the constitutional right had been described and understood, so that it was sufficiently well presented to the state court. In contrast, in this case in the trial court and in Appellant's Opening Brief in the Court of Appeal Hasso did not cite one single case grounded on a due process right under the Fourteenth Amendment to the U. S. Constitution. Furthermore, in the *Taylor* case, the petitioner had asserted his constitutional claim in his briefing in the state appellate court. In contrast, Hasso did not mention federal due process in his Appellant's Opening Brief.

In *Douglas v. Alabama*, 380 U.S. 415 (1965) the petitioner *did* make a timely objection in the trial court grounded on his right to confront witnesses and the Alabama Court of Appeal did "pass on" that issue in its opinion. Neither event occurred in this case.

In *Browning-Ferris*, this Court has recently stated the importance of a "developed record" on a federal due process challenge to punitive damages, stating that this Court "shall not attempt to decide the question in the absence of a record on the due process point. . . . " developed in the trial court and in the intermediate Court of Appeal. *Browning-Ferris, supra*, at p. 2921, fn. 23. There is no "developed record" in this case.

John Hasso has waived any federal due process objection and Respondent respectfully submits that this Court is without jurisdiction to grant the Petition.

III.

JUDGE CHAMPLIN MADE ORDINARY EVIDENTIARY RULINGS IN EXCLUDING FOUR PIECES OF DISCRETE EVIDENCE.

A trial court has considerable latitude in making ordinary evidentiary rulings.

The four pieces of evidence of which Hasso complains are discussed and analyzed in the Opinion of the Court of Appeal. (App. A to Pet., pp. B17-B20) The essential fact of John Hasso's basic fraud was his false promise, made at the beginning of the business venture in early 1977, to share profits from the properties with Duggan. Trial Judge Champlin determined that these four pieces of evidence were irrelevant to the issues presented to the jury at the second trial regarding recalculation of damages because they did *not* mitigate his fraudulent false promise. (App. A to Pet., pp. A1-A2) The three-judge panel on the Court of Appeal agreed with Judge Champlin, stating in the Opinion at Appendix B to Petition B17-B18:

> "None of [the four pieces of evidence] had any bearing on Hasso's false promise to share his profits with plaintiff, and our overall assessment is that the probative value of this evidence, if any, on the issue of Hasso's reprehensibility would have been slight by comparison to its potential for confusion and undue consumption of time. Accordingly we find no abuse of discretion associated with its exclusion under Evidence Code section 352."

Hasso fails to explain how each of the four pieces of evidence would have tended to mitigate his reprehensibility. (Pet., pp. 13-20)

Even if the evidence had any slight probative value on Hasso's reprehensibility, it was substantially outweighed by its potential for confusion and undue consumption of time under California Evidence Code § 352, which provides:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."[14]

With regard to irrelevant evidence and due process, the California Supreme Court stated in *People v. Babbitt* (1988) 45 Cal.3d 660 at page 685:

> "Here, because defendant's evidence failed to meet the threshold requirement of relevance, its exclusion pursuant to section 352 *did not implicate any due process concerns.*" (Emphasis added)

The California Supreme Court stated in another recent case, *People v. Hall* (1986) 41 Cal.3d 826 at page 834:

> "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice."

The four pieces of so-called mitigating evidence did not implicate federal due process.

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[14] Federal Rule of Evidence 403 is similar and provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

IV.

JUDGE CHAMPLIN MADE ORDINARY EVIDENTIARY RULINGS IN ADMITTING EVIDENCE OF HASSO'S PATTERN OF FRAUDULENT CONDUCT AFTER THE 1982 TRIAL IN TRANSFERRING AND LYING ABOUT HIS ASSETS SO AS TO AVOID COLLECTION EFFORTS FOR COMPENSATORY DAMAGES AND LIABILITY FOR PUNITIVE DAMAGES.

Under California law, a jury may consider the conduct of the defendant *right up to the time of trial* in fixing the amount of punitive damages "necessary in order to get defendant's attention." *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, 638.

Two primary purposes of a punitive damage award are *punishment* and *deterrence*. *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 790. Hasso engaged in "deceit" when he defrauded Duggan in 1977-1978. Hasso's repeated "deceits" from the 1982 Trial continuously on through the 1988 Trial, to which the Trial Court refers in its Notice of Decision (App. A to Pet.), were part of the same pattern of wrongful conduct. (See Statement of the Case, *supra*)

The Trial Court felt compelled to state in the Notice of Decision (App. A to Pet., p. A6):

> "The Defendant has lied so many times about his assets that it is truly impossible to know the full measure of his wealth." (CT 1403-1404)

Hasso has not described in his Petition the specific litigation conduct evidence that was admitted at trial which infringed on his federal due process rights. How is this Court to evaluate John Hasso's claim unless it is informed of the specific challenged evidence?

Hasso failed to object to most of this evidence and thereby waived any alleged error. Furthermore, this evidence was relevant and admissible on issues of Hasso's credibility and his financial net worth, whether or not these matters had probative value on his reprehensibility.

California Evidence Code § 353 specifically provides that Hasso waived any objections which were not "timely made and so stated as to make clear the specific ground of the objection . . . ." The Court of Appeal states in the Opinion (App. B to Pet., p. B24):

> "Most all of the evidence and argument to which defendant refers came in without objection, not because any objection would have been futile as defendant now claims, but because the argument was within the scope of the evidence, and the evidence was relevant to net worth or credibility or both. We find no error in connection with any of these matters."

Hasso apparently makes a related claim that he should have had pre-trial notice of the evidentiary facts which would be presented at trial on the issue of his reprehensibility. Under California Code of Civil Procedure § 2030, Hasso could have taken the simple pre-trial step of submitting contention interrogatories to Duggan, for the purpose of ascertaining the facts on which Duggan would rely in presenting evidence on the issue of his reprehensibility. Hasso failed to do this.

Hasso has simply failed again to elevate ordinary evidentiary rulings by Judge Champlin into "an important question of federal law" requiring this Court to grant Hasso's petition.

V.

THE COURT'S DECISION IN *BROWNING-FERRIS* FORECLOSES HASSO'S ARGUMENT THAT THIS COURT SHOULD ESTABLISH PROPORTIONALITY STANDARDS TO APPLY TO PUNITIVE DAMAGE AWARDS IN FEDERAL AND STATE COURTS IN ALL FIFTY STATES.

There are two (2) distinct but separate uses of the phrase "excessive damages," one of which *was* raised in the Trial Court and in the Court of Appeal and one which was *not* raised. Hasso did raise the question of whether the punitive

damage award of $2 million was "excessive" in the discrete and specific sense of whether the governing three (3) legal standards for calculating punitive damages were properly applied to the specific facts of this case. *Neal, supra* at p. 928.

In contrast, Hasso *never* raised the question of whether the punitive damage award was "excessive" in the sense that the Napa Superior Court jury in this case had "unbridled discretion to award punitive damages" or in the sense that the standards set by the California Supreme Court in *Neal, supra,* are themselves unconstitutionally vague or fail to provide sufficient "procedural safeguards."

This Court recently made it clear that the issue of "excessiveness" of punitive damages under state law is a matter for state law courts to determine. In *Browning-Ferris, supra*, this Court states at page 2922:

> "Although Petitioners and their *amici* would like us to craft some common-law standard of *excessiveness* that relies on notions of proportionality between punitive and compensatory damages, or makes references to statutory penalties for similar conduct, these are matters of State, and not Federal, common-law. *Adopting a rule along the lines Petitioners suggest would require us to ignore the distinction between the State law and Federal law issues. For obvious reasons we decline that invitation.*" (Emphasis added)

This Court also states at page 2921:

> "It is not our role to review directly the award for excessiveness or to substitute our judgment for that of the jury."

The question of whether the $2 million punitive award is excessive because the punitive damages are "disproportionate" to the compensatory damages is a state law issue. The question of whether the punitive damages are excessive because they are disproportionate to the wealth of the defendant is a state law issue. Furthermore, Hasso waived these issues.

Hasso never challenged the constitutionality of the standards themselves, so he has no standing to invoke the discretionary jurisdiction of this Court on that issue in this case.

VI.

IT WOULD BE A MISCARRIAGE OF JUSTICE FOR THIS COURT TO GRANT HASSO'S PETITION AND TO REVERSE THE TWO MILLION DOLLARS PUNITIVE DAMAGE JUDGMENT IN VIEW OF THE FACT OF HASSO'S PERJURY AT TRIAL AND THE FACT THAT HE IS ONLY REQUIRED TO DISGORGE A PORTION OF THE PROFITS HE GAINED BY HIS FRAUDULENT CONDUCT.

The Judgment below is the correct one.

The purpose of punitive damages in California is to punish wrongdoers and to discourage them from engaging in further wrongdoing. (*Neal, supra* at p. 928)

In the usual fact pattern in a punitive damage case, the assessment of punitive damages invades the assets of the defendant which were accumulated independent of the wrongful conduct. That is, the defendant is normally required to pay over money out of defendant's personal wealth, separate and apart from any accretion to his wealth directly resulting from the wrongful conduct. That fact is the true nature of the "punishment" and the true disincentive to again engage in similar wrongdoing.

However, is there really punishment and deterrence where the wrongdoer's wealth is untouched by the punitive damage award, and he is only required to disgorge a part of the profit which he gained as a direct result of his fraudulent conduct? If a wrongdoer still profits by his wrongful conduct, even though it is less than he originally planned, he may well conclude that the next time around he will enjoy complete success.

In this case, Hasso and Duggan agreed the profit from the properties was $3,367,284 (rounded to $3.3 million) (Trial Exhibit 16). The amount of profit was calculated as to each property *as of the date of sale.* All proceeds from sale of each property were received and retained by Hasso.

Appendix L is a "profit on profit" chart used in the courts below as to each of the properties, bringing the amount of the profit on each sale forward in time to the time of trial in 1988 using a 10% annual compounded interest factor. Based upon this reasonable interest factor, the accretion to the profit generated an additional $2 million.

Accordingly, the true economic profit gained by John Hasso as a result of his fraudulent conduct was $5.3 million (rounded).

The compensatory damages were $483,594 (CT 1076) (rounded to $500,000). If we deduct the compensatory damages of $500,000 and the $2 million punitive damage assessment from the $5.3 million economic profit, John Hasso is still left with *$2.8 million* of the economic profit gained from his fraudulent conduct.

All of his assets independent of this profit are completely untouched by the punitive damage assessment. The profit of $3.3 million was calculated by taking all of the money John Hasso had put into the common business enterprise to purchase the properties and to pay expenses on the properties and deducting those amounts from the gross proceeds from the sale of the properties. This was the formula for computing profits to which both Hasso and Duggan agreed and the jury was so instructed in the Statement read to the jury (App. I, p. 15).

Accordingly, there was no invasion of any assets owned or accumulated by Hasso. He is only required to disgorge some of the fraudulent profits.

Even if we disregard the reasonable calculation of a $2 million accretion based upon availability and use of the profits over a period of years, we still have an *agreed profit* of $3.3 million. If we deduct compensatory damages and punitive damages of $2.5 million, Hasso still has a net profit of $800,000. The Court of Appeal observed that the profits exceeded the damage award. (App. B to Pet., p. B33)

In either circumstance, can it fairly be said that John Hasso has been punished? Can it fairly be said that he has

been discouraged from ever again attempting to defraud a business partner?

Hasso not only committed intentional fraud on Duggan, but he engaged in a pattern of lying and deceit spanning a period of many years. Judge Champlin remarked (App. A to Pet., p. A8) that the punitive damage assessment of $2 million:

> " . . . is warranted considering the totality of the facts and circumstances in this case including the original fraud, and the defendant's compounding conduct during the last several years, *all of which have been an affront to the court system and this community's sense of fair business practices.*" (Emphasis added)

Charles Duggan respectfully urges this Court to bring this 13-year lawsuit to a prompt conclusion by ruling during June 1990 denying Hasso's Petition for Writ of Certiorari.

Hasso baldly seeks further delay in this matter by suggesting this case be tied to the disposition of *Pacific Mutual Life Ins. Co. v. Haslip* (Ala. 1989) 553 So.2d 537, *cert. granted*, 110 S.Ct. 1780 (April 2, 1990). There are significant differences between these two cases. First, in this case the ratio of punitive damages to compensatory damages is 4.2 to 1. It appears that the ratio in *Pacific Mutual* is apparently in the range between 40 to 1 and 400 to 1.

Second, in this case it was Hasso himself who perpetrated the fraud. In contrast, in *Pacific Mutual* the insurance company was held liable under *respondeat superior* for the apparent acts of an agent, on an insurance policy which Pacific Mutual apparently did not issue.

Third, this case does not implicate the prospect of affecting the operating procedures of an industry like insurance which affects a large segment of society. The dispute between Duggan and Hasso is a dispute between private parties that will have absolutely no effect on any industry and will not result in any real or apparent "pass through" of the punitive damage award to members of the consuming public.

Fourth, in addition to the basic intentional fraud, Hasso's pervasive lies and deceit over many years was an "affront to

the court system" to use the words of The Honorable Philip A. Champlin, sitting as trial judge. Hasso lied to a federal bankruptcy court (see Appendix N), he lied in sworn declarations under penalty of perjury to both the Napa Superior Court (Appendix M) and the Court of Appeal, and he lied to the jury in the five-week 1982 trial and to the jury in the four-week 1988 trial. In contrast, there does not appear to be any evidence in *Pacific Mutual* of such a protracted and flagrant and intentional abuse of judicial process.

Fifth, in this case Hasso has waived any due process challenge either to California Civil Code 3294 or to the three standards for calculating the amount of punitive damages set forth in BAJI 14.71.

The California legislature has specifically expressed a policy regarding a speedy resolution to disputes in California Government Code § 68601(b) which states:

> "Delay in resolution in both Civil and Criminal litigation is not in the best interest of this State and the public. The people of the State of California expect and deserve prompt justice and the speedy resolution of disputes. . . . Delay reduces the chance that justice will in fact be done, *and often imposes severe emotional and financial hardship on litigants.*"

By attempting to tie this case to *Pacific Mutual*, Hasso is attempting at the very minimum to delay disposition of his Petition until the October 1990 Term of this Court or beyond, when this case is already in its 12th year.

CONCLUSION

Respondent Charles Duggan respectfully asks this Court to deny John Hasso's Petition for Writ of Certiorari during June 1990, to transmit the Order Denying Petition immediately to the California Court of Appeal, and to grant such further relief as the Court may deem just and proper in the circumstances.

DATED: May 31, 1990

Counsel of Record:

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APPENDIX G

EXCERPT FROM OFFICIAL REPORTER'S TRANSCRIPT, TRIAL JUDGE'S DECISION TO USE PETITIONER'S PROPOSED 14.71 JURY INSTRUCTION [RT 2203:4 - 2204:1]

MR. JACOBSON: And the other thing I had, your Honor, was I—on punitive damages the 14.71 instruction. I don't know that we ever concluded as to whether or not—or what the first sentence would be.

And I had proposed, in my first sentence to 14.71 to read as follows. And I quote, it has been established that you should award punitive damages against defendant's John Hasso, Elissa, N.V., Pacific Midland, N.V., and Rumba N.V., for the sake example and by way of punishment close quote. And I didn't know what your Honor intended on that introductory—

THE COURT: The one I had before me that I intended to give reads you shall award punitive or exemplary damages against defendant's for the sake of example and by way of punishment.

MR. JACOBSON: That's fine, your Honor.

THE COURT: The law provides no fixed standard as to the amount of such punitive damage. I think 14.71 is verbatim.

MR. JACOBSON: Is it?

MR. GULICK: Well, I changed it to shall—I mean—

THE COURT: Yeah. Right.

MR. GULICK: Instead of may.

THE COURT: I think that's your—*I took your version of 14.71, Mr. Gulick.* Anything else? (Emphasis added)

[RT 2203:4 - 2204:1]

APPENDIX H

HASSO

JURY INSTRUCTION NO. 25

BAJI 14.71

PUNITIVE DAMAGES—RECOVERY OF AND MEASURE

You shall award punitive or exemplary damages against defendants for the sake of example and by way of punishment.

The law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant.

(2) The amount of punitive damage which will have a deterrent effect on the defendants in the light of defendants' financial condition.

(3) That the punitive damages must bear a reasonable relation to the actual damages.

GIVEN /s/ P.C.

REJECTED _____

MODIFIED _____

WITHDRAWN _____

[CT 1053]

APPENDIX I

STATEMENT READ TO THE JURY

"These are the facts that have been established as a result of the first trial that everybody has made reference to. And these are all to be accepted by you as givens in the case. There will be no further proof necessary or other evidence necessary to establish these facts.

All right. Ladies and gentlemen this case is coming back for retrial on the issues of compensatory and punitive damages following an earlier trial where the issue of the Defendants' liability for those damages to the Plaintiff was established. In other words, you will only be concerned with recalculating the damages due from Defendants to Plaintiff, an earlier determination having been made that Defendants defrauded Plaintiff.

The facts as established in the earlier proceedings are as follows: Prior to immigrating from South America, where he was born, Plaintiff Charles A. Duggan, practiced law there. In 1969 Mr. Duggan became an instructor at Pacific Union College in Napa County. A number of years later Mr. Duggan met Jennifer Hasso, who was a student at the college and the daughter of John Hasso and Hebe Hasso. At about the same time, the defendant, John Hasso, moved to the Napa Valley from the Middle East where he had been a distributor for a number of major American companies. Charles Duggan and the Hasso's became social friends after Jennifer Hasso introduced him to her parents.

In the Spring of 1977, John Hasso and Charles Duggan discussed their mutual interest in real estate investment. Charles Duggan told John Hasso that he was familiar with the real estate market in Napa County and knew how to subdivide and develop property. John Hasso, in turn, told Charles Duggan that he hoped to avoid paying a ten percent brokers' commission at the time of the purchasing real estate and wanted to work with somebody that would 'ride with him'.

As a result of their conversation, Charles Duggan took John Hasso to view two potential purchases. The Noonan Winery Property and the Plateau Ranch Property. They discussed working together in a partnership arrangement with John Hasso providing funds to purchase, maintain and develop properties and Charles Duggan assuming responsibility for locating, evaluating and negotiating the purchase and sale of the properties. They agreed that John Hasso would receive an 85 percent interest and Charles Duggan a 15 percent interest in the capital of the partnership and in the partnership profits. They did not agree at that time on further details of the arrangement such as the meaning of 'capital'. However, by promising to loan Charles Duggan $50,000 for living expenses after Charles Duggan indicated that his partnership responsibilities would require him to take a leave of absence from his teaching duties, John Hasso demonstrated his own belief that they had formed a working relationship. This loan was later discharged by the transfer of the some real property to John Hasso.

Shortly thereafter, John Hasso left on a trip to the Middle East. While he was away, John Hasso maintained communications with Charles Duggan regarding the progress of Duggan's activities. Based on those communications, Charles Duggan negotiated the purchase of the Noonan Winery and Plateau Ranch Property. Charles Duggan executed the purchase contracts and later, when escrow closed, title to the winery properties was taken in the name of Hebe Hasso and the ranch title was taken in the name of Kim Susan Hasso, one of Hasso's daughters.

During his overseas trip, John Hasso obtained tax advice from an English attorney that suggested that he form a corporation in the Netherlands Antilles, a tax haven, and take title to the properties being purchased in the name of that entity. Based on that advice, John Hasso incorporated an entity named Elissa N.V., and later had title to the Plateau Ranch Property transferred to Elissa N.V. from his daughter. When Elissa N.V. was liquidated in 1979, the assets held in its name were transferred to two other entities known as Pacific Midland N.V. and Rumba N.V., which were two

other Netherlands Antilles Corporations that were nominally owned by John Hasso's mother-in-law, both of which were actually managed and controlled by John Hasso.

While John Hasso was still outside the United States, Charles Duggan located several more properties for possible acquisition. These included the Watts Property, the Valley View Property, and two Lake Tahoe condominiums. When John Hasso returned from the Middle East, he agreed that Charles Duggan should ask attorney George Humphreys to prepare a formal partnership agreement. Charles Duggan was not admitted to practice law in California. He and Humphreys previously performed a partnership in which Charles Duggan rendered international legal advice. John Hasso and Charles Duggan later met in Humphreys' law office and executed a Memorandum of Understanding concerning their joint undertaking. Humphreys told John Hasso that the memorandum was a temporary, incomplete, document because it did not identify the property involved. Charles Duggan mentioned that future acquisitions would require separate joint venture agreements and expressed his concern that the Memorandum did not reference Hebe Hasso or Elissa N.V. He was also concerned that the meaning of 'partnership capital' was not defined.

In the months which followed execution of the Memorandum of Understanding, the previously identified properties (Watts, Valley View and Lake Tahoe condominiums) were purchased. Two other properties, Trancas Avenue and Main Street, were also acquired. Title to the Lake Tahoe condominiums was taken in Hebe Hasso's name, while all the other properties were purchased in the name of Elissa N.V., John Hasso and Charles Duggan agreed that Charles Duggan was to receive 15 percent interest in the five properties which he had located and negotiated to purchase. In the case of the Trancas Avenue and Main Street properties, they agreed that Charles Duggan would receive lesser interest, (five percent and ten percent respectively) because they were located by John Hasso. The total amount paid for all of the properties was 1,649,355.08.

After five months—pardon me—about five months after the Memorandum of Understanding was executed, Charles Duggan presented John Hasso with a draft joint venture agreement that had been prepared by attorney Humphreys. In addition, to Charles Duggan and John Hasso Elissa N.V. was named as a party to the agreement. It provided that no party had the right to withdraw capital from the venture without the written consent of other parties. Blanks were left in the draft agreement so that the properties it covered could be identified and other blanks were left for the percentage interests in capital and income held by each party. John Hasso told Charles Duggan that he found the agreement too complicated and declined to sign it. However, he agreed to put Charles Duggan's name 'in title for 15 percent of the property'. Several weeks after Charles Duggan and John Hasso discussed the draft agreement, John Hasso wrote to Charles Duggan describing their past agreement as one of 'business partners'. In the letter John Hasso informed Charles Duggan that he saw no need to come to a proposed meeting to discuss the partnership agreement because he, John Hasso, was terminating their relationship.

Charles Duggan later filed this lawsuit naming John Hasso, Hebe Hasso, Kim Susan Hasso and Elissa N.V. as Defendants. He requested general and punitive damages based on a fraud claim. Prior to trial, Charles Duggan amended his pleading in order to name Pacific Midland N.V. and Rumba N.V. as additional Defendants.

At the first trial, Charles Duggan presented evidence from which the jury could infer that the Defendant, John Hasso's, net worth was in excess of ten million dollars. The Claim of fraud was tried to a jury. Charles Duggan prevailed on his fraud theory. By its unanimous verdict, the jury also found that the Defendants John Hasso and the three Netherlands Antilles Corporations had committed intentional fraud against Charles Duggan. The jury found against John Hasso on his counterclaim of fraud against Charles Duggan.

The verdict was appealed by the Defendants. The Court of Appeal upheld the jury's verdict based on fraud, but ruled that the Plaintiff's damages were not properly calculated and sent the case back for a retrial to recalculate compensatory and punitive damages.

In part it will be the responsibility of this jury to determine Plaintiff's compensatory damages based upon the profit resulting from these transactions. Mr. Hasso and Mr. Duggan agree that any profit on the sale of these properties, would be calculated by taking the sales price and deducting the purchase price plus any expenses relating to the properties.

For your convenience, a list of the properties showing its date of purchase and the date of sale—of each property is attached to this statement of facts.

I'm not going to read that to you today, but it will be attached and you will be given a copy of this statement of facts when you come back tomorrow.

This statement of facts that I just read to you will be made available to you for consultation during the trial. At the conclusion of the case you will be instructed on the applicable rules of law by which you should be guided in evaluating compensatory and punitive damages.

All right, ladies and gentlemen that's the statement of facts. That's the last time I'll read it to you. You will have a copy of it."

[RT 823:20 - 829:28]

APPENDIX J

FILED MAR 21 1988
JANICE NORTON
Napa County Clerk
BY /s/ K. A. MIERSCH
DEPUTY CLERK

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF NAPA

CHARLES A. DUGGAN, *Plaintiff,* v. JOHN HASSO, *et al.,* *Defendants.*	No. 39856 *DEFENDANTS' PROPOSED PROCEDURAL AND FACTUAL STATEMENT TO BE READ INTO THE RECORD*

A Court of Appeal decision which recites the facts found in a trial will support the application of the doctrine of collateral estoppel (*Tushinsky v. Arnold* (1987) 195 Cal. App. 3d 666, 672-673n5; *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 Cal. App. 3d 39, 45-46). This means that the recitation of the facts found by the Jury as gleened from the record by the Court of Appeal is an adequate statement of facts that the Court and Jury should determine to have been found. Thus, to avoid error and to be fair to the parties, Defendants submit that the Court of Appeal decision and

recitation of the facts in the opinion should be adopted by the Trial Court as an error proof statement of what the record shows with respect to factual determinations. To permit the parties to argue the findings of other facts would be contrary to the doctrine of collateral estoppel.

Ordinarily, the doctrine of collateral estoppel which is a secondary aspect of *res judicata* precludes the relitigation of issues that necessarily were determined between litigants in an earlier action. For instance, the California Supreme Court observed the following with respect to the doctrine of collateral estoppel in the case of *Clark v. Lesher:*

> "This aspect of the doctrine of *res judicata*, now commonly referred to as the doctrine of collateral estoppel, is confined to issues actually litigated. It is not an easy rule to apply, for the term "issue" as used in this connection is difficult to define, and the pleadings and proof in each case must be carefully scrutinized to determine whether a particular issue was arised even though some legal theory, argument or "matter" relating to the issues was not expressly mentioned or asserted." (*Clark v. Lesher* (1956) 46 Cal. 2d 874, 880-881).

The cases that apply the doctrine of collateral estoppel referred to the doctrine as "issue preclusion". If issues are determined in the case, their relitigation is completely precluded in the later litigation. This means that if an issue of law or fact is litigated and determined, that eliminates the relitigation of that issue later (*People v. Sims* (1982) 32 Cal. 3d 468, 484; *J. R. Norton Co. v. Agricultural Labor Relations BD.* (1987) 192 Cal. 3d 874, 884-885; *Rosenfield, Meyer & Susman v. Cohen* (1987) 191 Cal. App. 3d 1035, 1062-1063).

The solution to the trial court in this case given the admonition of *Clark v. Lesher* concerning the difficulty of determining what issues have been decided, comes in the form of the appellate decision. The Appellate Court recited facts and procedure for 8 pages after reviewing the arguments and the record on appeal in its entirely. Under the doctrine of collateral estoppel as articulated in *Weiner v. Mitchell,*

Silberberg & Knupp, that appellate opinion establishes the existence of these facts. Defendants submit that the Trial Court can short circuit a lengthy dialogue or dispute over which issues has been determined and what facts are established by simply looking to the appellate opinion. In this way, the Court is acting in accordance with the rules articulated by *Tushinsky & Weiner* regarding the record and recitation of facts by a Court of Appeal. If the Court recites the facts as contained in the Appellate opinion, it is certain that it will be free of error. This would appear to be the most prudent and time saving course available to the Court.

[CT 883 - 855]

APPENDIX K

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IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

CHARLES A. DUGGAN, *Plaintiff and Respondent,* v. JOHN HASSO *et al.*, *Defendants and Appellants.*	No. A042843 NAPA COUNTY SUPERIOR COURT No. 39856 *PETITION FOR REVIEW*

TO THE HONORABLE MALCOLM M. LUCAS, CHIEF JUSTICE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Defendants and appellants, John Hasso, *et al.* ("Hasso"), respectfully petition for a review of two closely related issues in the opinion below. This case presents an appropriate and compelling occasion for an exercise of this Court's selective review power. *See*, Cal. Const., art. VI, section 12, and Rules of Court 29.2 and 29.4.

I.

ISSUES PRESENTED FOR REVIEW

A.

When a civil action had been remanded for a new trial on punitive damages but not liability, could the defendant be precluded from contesting the alleged reprehensibility of

the very conduct for which he was facing severe punishment? (Opinion, pp. 15-17) May the resulting $2,000,000 punitive damages award be upheld on the theory that trial courts may limit trial evidence in their discretion? (Op., pp. 17-20)

B.

When the only pleaded conduct supporting any punitive damages award in this case was an alleged fraudulent promise made in 1977, could such an award be assessed at trial, and later approved on appeal, even in part on the basis of a so-styled "pattern of fraudulent conduct since the first trial" (Op., p. 32), namely, a miscellany of unpleaded charges of misdeeds between 1982 and 1988, prominently including steps taken in the defense of this lawsuit? (Op., pp. 5-10, 20-26, 31-32)

II.

REASONS FOR GRANTING A REVIEW

A. Introduction

California's "civil" punishment system has gone haywire. Mr. John Hasso was supposed to be on trial for the conduct alleged in the complaint against him, a 1977 promise to an acquaintance about a prospective real estate venture. (Op., pp. 2-3) But Mr. Hasso was prohibited from defending or mitigating his 1977 conduct before the jury. He was tried, instead, on a hodgepodge of unpleaded charges of subsequent misconduct. The trial and resulting award are frighteningly irreconcilable with the state and federal guarantees of due process.

Only recently, this Court held that "[D]ue process requires . . . fair notice of the nature of the penalties and proceedings he faces. . . . " *Mitchell v. Superior Court* (Dec. 28, 1989) 90 C.D.O.S. 39, 44. If the Mitchells were entitled to a written statement of which statutes they were facing in a misdemeanor-level contempt prosecution, was a punitive damages defendant not likewise entitled to some pleading,

at least, articulating this $2,000,000 "pattern of fraudulent conduct"? (Op., p. 32) And how could a reviewing court then rely principally on such a "pattern" to justify the severe punishment below (Op., p. 32), especially when the only *pleaded* conduct had been excluded from the trial? What about the right to a "meaningful" opportunity to defend? *Rios v. Cozens* (1972) 7 Cal.3d 792, 797.

B. Which Crime Fits the Punishment?

After a brief synopsis of the case, the opinion correctly observes that "Punitive damages . . . became the principal focus of the second trial." (Op., p. 4) Thus, one would next expect a description of the conflicting evidence and arguments at the trial about the reprehensibility of the conduct in question— the conduct, after all, for which the new "penalty phase" trial had been ordered.

But *that* conduct had been held to be off limits at the new trial. (Op. pp. 15-20) The court had rules that "This is a case that's limited to damages . . . ;" that evidence about the actual conduct in dispute could be "terribly confusing to the jury . . . ;" and that it would suffice—and afford "equal treatment" —to read a short summary of the underlying facts. (All quotes at Op., p. 17)

Although the degree of reprehensibility of the conduct in question would seem to be the very touchstone for assessing and then reviewing any punitive damages award, the trial court flatly precluded Mr. Hasso for defending and attempting to mitigate his 1977 conduct. In the words of the pertinent subtitle of the opinion, there had been an "exclusion of evidence of [the] parties' initial relationship." (Op., p. 15) The opinion finds no error and no harm in this approach.

What, then, was the trial all about? Page one of the respondent's brief below (filed June 12, 1989) correctly described the conduct actually in issue: the alleged "false promise to share profits . . . in the Spring of 1977." By page 97 of the same brief, however, respondent was concluding with his oft-repeated charge that there had been "eleven (11) years of fraud and deceit."

The opinion below fleshes this out. In lieu of any discussion of the reprehensibility of Mr. Hasso's conduct in 1977, the opinion quotes extensively from the trial court's harsh views about Mr. Hasso's credibility as a witness regarding his assets. (Op., pp. 4-10) That primarily, plus an assortment of charges "about actions taken in the defense of the lawsuit" (Op., p. 20 *et seq.*), add up to the theme of "eleven years of fraud" in this case. And this "eleven years" argument was upheld as perfectly permissible to the jury, too (Op., p. 23), although neither the opinion nor the respondent can point to an articulated legal theory giving Mr. Hasso notice of such an expansive and litigation-centered punitive damages claim against him.

Even more surprising, however, is the opinion's invocation of the "eleven years of fraud" theme to justify the size of the punitive damages award. The opinion acknowledges that "Reprehensibility of the defendant's conduct is one of the factors to be considered in assessing punitive damages." (Op., p. 31) But then, in response to Mr. Hasso's contention that he was only supposed to be punished for the pleaded conduct in 1977, the opinion states as follows:

> This argument overlooks all of the evidence outlined in section I(C), *supra*, [pp. 5-10] from which the jury could infer that defendant had engaged in a pattern of fraudulent conduct *since the first trial* by transferring and lying about his assets so as to avoid liability. Defendant contends that this court "mandated" a retrial relating to "the conduct affirmed in the original appeal as fraudulent," but we did not grant defendant a license to misrepresent his net worth. . . . [T]here is no reason why deceit during the course of litigation should be treated differently for purposes of punitive damages than any other form of fraud. (Op. p. 32) (Emphasis added)

But "deceit during the course of litigation" had never been articulated as a charge in this case! Certainly, it had never passed muster against a demurrer.

In short, the trial was a completely unbounded, free floating attack. And then, incredibly, the reviewing court cites that very unboundedness as the basis for affirming the $2,000,000 punishment that resulted: "In light of the pattern of fraudulent conduct, we are unable to conclude that the award was excessive in relation to reprehensibility." (Op., p. 32)

C. Impact on Petitioner

John Hasso is an individual, not a business enterprise. He is unable to pass along or spread out a $2,000,000 punishment among his customers or different product lines. Nor was he ever charged with making fraudulent promises to others. He also paid the compensatory damages award after the new trial (*see*, RB 17), so this appeal has always been limited to the punitive award.

It would be unconscionable to leave undisturbed the $2,000,000 punishment in this case. Aside from the ripeness and general import of the legal issues presented, John Hasso the individual should simply not be punished in this state and this country in the manner that he was. Alice had better justice in Wonderland; she kept her head.

One might also recall several of the original circumstances in 1977 that presumably dictate the contours of this lawsuit. Hasso and respondent Duggan had orally agreed to certain general terms for a mutual real estate venture (RB 20), but they never settled some important details of Duggan's prospective interest. (*Id.*) As a result, and in the absence of any effective written agreement, it has already been determined in this lawsuit that "no partnership existed. . . ." (Op., p. 3)

The opinion also mentions briefly that Hasso had "declined to execute a more detailed joint venture agreement and eventually advised plaintiff that he was terminating their relationship." (Op., p. 3) Might the penalty-phase jury have properly considered the fact that the document Hasso rejected had been prepared by a Duggan attorney who passed himself off as Hasso's attorney, and that the document substantially

favored Duggan beyond any terms Hasso had ever even discussed? (Findings 6 and 8, C.T. [first trial] 1257-1258; and R.T. [first trial] 567-68, 1121-1124) And might the jury have properly considered Hasso's other reasons, too, for terminating his business relationship with Duggan? (*See* AOB [first appeal] 32-33) Just how reprehensible was Mr. Hasso's conduct?

There was every reason to accord this defendant the ordinary right to explain and attempt to mitigate the conduct for which he was facing a severe punishment. Deprived of that basic right, and exposed instead to a truly demagogic attack for "eleven years of fraud," Hasso should not suffer the blow of the $2,000,000 punishment that resulted.

D. Impact on the Public

Finally, it is too late in the day to question the significant public impact of punitive damages award. The United States Supreme Court has already observed that due process and other challenges in this area "raise important issues which, in an appropriate setting, must be resolved. . . ." *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813, 828-829. Justice O'Connor recently catalogued some of the heavy burdens of "skyrocketing" punitive damages awards upon American society. *Browning-Ferris v. Kelco Disposal* (1989) 106 L.Ed.2d 219, 242-243 (O'Connor, J., concurring and dissenting). This need not be reiterated here.

California is hardly a jurisdiction that shies from large punitive awards. The opinion below makes the usual unprincipled defense of the instant award by citing even larger ones elsewhere. (Op., pp. 30-31) California's housing inflation pales by comparison.

Whatever salutary purposes a large punitive award might serve in an individual case, the number, escalating size and public impact of punitive awards in California today call mightily for the measuring hand of tighter due process controls. That can only come from this Court. The lower

appellate courts will evidently not move first in this direction. (See *post*, p. 11)

III.

THE SCOPE OF A REVIEW

Preliminarily, while due process may have been mentioned explicitly for the first time on Hasso's petition for rehearing (at p. 8), he amply preserved both of the procedural points urged here. He argued, for example, that the various rulings "effectively deprived defendant of a fair trial on punitive damages" (AOB 41) and "violated settled law protecting a litigant's right to defend himself. . . ." (AOB 45) In any event, though, these timely and highly significant Constitutional issues should be addressed even if Hasso had failed to raise them adequately below, *see, e.g., Hale v. Morgan* (1978) 22 Cal.3d 388, 394, "especially when the enforcement of a penal statute is involved. . . ." (*Id.*)

Fair notice and a fair opportunity to defend are fundamental hallmarks of due process. Are they inapposite in a punitive damages case just because it is labeled "civil"? Presumably not. *Hale v. Morgan, supra*, applied due process to a much more modest "civil" penalty against landlords, 22 Cal.3d at 398-399, but this threshold question manifestly needs to be settled in the punitive damages context.

The United States Supreme Court recently observed, in *dictum*, that a punitive damages award "may not be upheld . . . if it was reached in proceedings lacking the basic elements of fundamental fairness." *Browning-Ferris v. Kelco Disposal, supra*, 106 L.Ed.2d 219, 239. Two of the Justices wrote separately to underscore that *Browning-Ferris* "leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." 106 L.Ed.2d at 241 (Brennan, J., concurring).

The door is thus open for such a ruling, and this record cries out for one. It would also be a modest ruling in one sense, because the due process violations were extreme.

Assuming *arguendo* that due process is applicable, is it satisfied in punitive damages cases simply by intoning the usual jury instructions on the relevant considerations? Two months earlier, the same Court of Appeal had "declined[d] the invitation to be the first court in this state to rule that such instructions do not afford due process." *People Ex. Rel. Dept. of Transportation v. Grocers Wholesale Co.* (Sept. 29, 1989) 214 Cal.App.3d 498, 514. This Court should do so now, to this extent: It should rule squarely that established due process principles *do* apply in punitive damages cases; *do* require the basic procedural protections of fair notice and a fair opportunity to defend; and are *not* always satisfied by a mere recital of the usual jury instructions.

Indeed, the usual instructions tell the jury "to consider the reprehensibility of the conduct. . . . " *Grocers Wholesale, supra,* 214 Cal.App.3d at 514. Due process was hardly satisfied by giving such an instruction in the instant case, because the whole reprehensibility issue had been grotesquely distorted at the trial.

With the power of selective review, this Court can reach directly to the crux of this case. The petitioners invite that limitation of the review. *See generally, DeTomaso v. Pan American World Airways, Inc.* (1987) 43 Cal.3d 517, *and see* fn. 2 at 520. Although the records and briefs below are voluminous, the issues presented in this petition can be adjudicated without poring through all that material. The nature and impact of the twin due process violations herein are apparent virtually on the face of the opinion below.

IV.

PREVIEWING THE MERITS

This petition will now conclude with a very brief introduction to the two due process issues presented.

A. The Right to Notice

Not surprisingly, it was a criminal proceeding that prompted this Court most recently to invoke the due process

right to notice, there, the right to "fair [written] notice of the nature of the penalties and proceedings he faces. . . . " *Mitchell v. Superior Court, supra,* 90 C.D.O.S. 39, 44. Just the same, the due process guarantee has been deemed to apply to inflictions of "grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction. . . . " *Matthews v. Eldridge* (1976) 424 U.S. 319, 333. *Accord, Jones v. State Bar* (1989) 49 Cal.3d 273, 288.

In the instant "civil" case, therefore, a serious question arises about the lack of any formal specification of the "eleven years" of conduct for which Mr. Hasso was punished. Long before *Mitchell,* this Court wrote in a civil case that "the essence of the matter is fairness in pleading to give the defendant such notice by the complaint that he may prepare his case." *Leet v. Union Pac. R. Co.* (1944) 25 Cal.2d 605, 619.

Fraud itself must be pleaded with particularity. Yet the $2,000,000 fraud punishment in the instant case was inflicted at trial, and then affirmed on appeal, without the slightest discipline of a particularized statement. The trial roamed freely across the plaintiff's wide landscape of accusations. In a recent rejection of a due process challenge in this area, a Court of Appeal *assumed* that "the conduct which warrants such an award is defined in careful detail." *Radell v. Comora* (1989) 211 Cal.App.3d 1244, 1259. It certainly should be, but here it manifestly was not.

Most likely, the discipline and notice of a pleading would also have averted the spectacle of Mr. Hasso's trial on charges of defending himself in this very action. Hasso has cited in vain to such cases as *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, for the proposition that acts in defense of the litigation cannot be turned around as the substantive basis for punishment. Reason would surely have prevailed in this case long before now had respondent ever attempted to reduce his "eleven years of fraud" to a pleading.

In sum, the basic notice requirement of due process may well have averted the mockery of a trial below.

B. The Right to a Meaningful Opportunity to Defend

Once the trial began, however, another due process right came into play: the right to defend. "The hearing required by the Due Process Clause must be 'meaningful' . . . and 'appropriate to the nature of the case.' " *Bell v. Burson* (1971) 402 U.S. 535, 542-542. *Accord, Rios v. Cozens, supra*, 7 Cal.3d 792.

Bell and *Rios* both involved the suspension of a driver's license. That significant a deprivation, it was held, required a meaningful opportunity to defend against an administrative finding of probable liability for causing an accident. The pertinent statutes having made such liability "an important factor" in the scheme, 402 U.S. at 541, the administrative hearing *had* to give the affected party an opportunity to defend on that issue:

> [A] hearing which excludes consideration of an element essential to the decision . . . does not meet this [due process] standard. (402 U.S. at 542)

This Court should now hold squarely that, for due process purposes, the reprehensibility of the conduct in question is "an element essential to the decision" in a punitive damages case. That element may simply not be pretermitted from a punishment trial. "[T]he function of punitive damages is not served by an award which, in light of the defendant's wealth *and the gravity of the particular act*, exceeds the level necessary to properly punish and deter." *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 (emphasis added).

In *Hale v. Morgan, supra*, 22 Cal.3d 388, this Court significantly limited a civil penalty statute on due process grounds because, among other things, it omitted any of the "moderating influences" found in comparable statutes. It excluded any consideration of "ameliorating factors" or the "degree of culpability." 22 Cal.3d at 399. Compounding that problem, too, was the "potential limitless" penalty which was possible under the statute. *Id.* at 404. This Court concluded by giving the statute a limiting construction to avoid "constitutionally excessive penalties." *Id.*

So here. The time is ripe and the record is presented for a modest holding indeed, that this basic due process protection does apply in punitive damages cases. Civil defendants, no more than criminal ones, must not be exposed to substantial punishment without a meaningful opportunity to defend themselves.

V.

CONCLUSION

A review is compelled in this case for all the reasons stated. We urge that it be granted.

Dated: January 9, 1990

BRONSON, BRONSON & MCKINNON

By /s/ ELLIOT L. BIEN
ELLIOT L. BIEN
Attorneys for Defendants and
Appellants, JOHN HASSO *et al.*

APPENDIX L

THE PROFIT ON PROFIT FROM THE FRAUD

PROPERTY	DATE OF SALE[1]	PROFIT AT TIME OF SALE[2]	PROFIT ON PROFIT[3]
NOONAN WINERY ..	March 4, 1981	$1,467,464	$1,392,183
PLATEAU RANCH....	May 31, 1984–December 15, 1987 (9 lots)	$ 477,602	$ 100,296
WATTS (ACB)	June 12, 1981 (5 acres); November 19, 1984 (234 acres)	$ 969,438	$ 320,884
VALLEY VIEW	April 29, 1983	$ 77,418	$ 47,264
TAHOE CONDO (#89).....	January 2, 1981	$ 18,312	$ 17,373
TAHOE CONDO (#92).....	November 4, 1980	$ 26,597	$ 25,233
MAIN STREET.....	November 19, 1984	$ 230,698	$ 76,361
TRANCAS.....	August 8, 1980 (35%); January 20, 1984 (50%)	$ 99,755	$ 74,208
THE "PROFIT ON PROFIT" AT TIME OF 1988 TRIAL:			**$ 2,053,802**

[1] Attachment to Statement of Facts. (CT 898)

[2] The amounts shown reflect the "true profit" generated from sale of the subject properties and have been computed using the formula agreed upon by the parties [i.e., Sales Price − (Purchase Price + Expenses) = Profit]. (Trial Exhibits 14, 15, and 16)

[3] The amount of profit from the date of sale was brought forward to the 1988 Trial using a ten percent (10%) annually compounded interest factor.

APPENDIX M

FILED SEPT - 7 1982
FLORENCE W. CUNNY, CLERK
BY /s/
DEPUTY CLERK

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IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF NAPA

CHARLES A. DUGGAN,
Plaintiff,

vs

JOHN HASSO, *et al.*,
Defendants.

AND RELATED CROSS-ACTION

No. 39856

DECLARATION OF JOHN HASSO IN SUPPORT OF MOTION FOR STAY OF EXECUTION

I, JOHN HASSO, declare and state:

I am one of the Judgment Debtors herein; all of the matters stated are within my own personal knowledge except as to those stated to be upon information and belief and as to those I am informed and believe them to be true. If called as a witness I could competently testify to each and every fact set forth herein.

All of the material assets owned by myself and the other Judgment Debtors (ELISSA, N.V., PACIFIC MIDLAND,

N.V., and RUMBA, N.V.) consist of unimproved real property. These real properties are located principally in Napa and San Bernardino Counties, California and consist of fourteen different parcels of land having an aggregate fair market value as of September 1, 1982, in the sum of $6,812,925.00. I have attached hereto as Exhibit "1" a schedule of all of these real properties identifying them by property description and separately stating the fair market value for each parcel.

The fair market value of the properties located in Napa County, California, as stated in Exhibit "1" are based upon the testimony of Mr. DEAN STAHR (Plaintiff's expert witness) during the trial of this action which values were accepted by the Jury and were the basis for their verdict.

Ten of these parcels have existing liens upon them (evidenced by promissory notes secured by deeds of trust thereon) having an aggregate total liability of $1,395,811.13. The amount of the individual existing liens as to each parcel of real property is set forth on Exhibit "1" hereto.

The equity or net value of all of the real property assets owned by myself and the other Judgment Debtors totals $5,417,113.87 (an amount far in excess of that required to satisfy the judgment recorded herein).

All of the real property assets of myself and the other Judgment Debtors are unimproved real property from which *no income is derived.* To the contrary, these properties require the constant outlay of cash for real property taxes, debt service, and miscellaneous charges.

Neither myself nor the other Judgment Debtors have any employment or other source of income for the purpose of making these payments. It was my initial intent and plan to develop and sell the real properties as identified in Exhibit "1" for the purpose of maintaining a cash flow to pay the debt initially incurred in their purchase and for their development.

Because of the lis pendens that was recorded by the plaintiff herein at the outset of this action and the Abstracts of Judgment recorded in both Napa and San Bernardino Counties following entry of the Judgment, my hands have

been effectively tied as I have not been able to generate sufficient cash by way of sale or development of these properties for the purpose of continuing to service the debt incident thereto.

At the present time, installments on the notes secured by deeds of trust on the various parcels of real property are either due or will shortly become due. The dates to which these notes have been paid or on which installments will become due is set forth in Exhibit "1" attached hereto.

As of September 1, 1982, there is currently owing $195,086.39 against the various notes. The individual amounts due attributable to each parcel of real property is set forth in Exhibit "1" hereto.

I am unable to raise sufficient funds to pay these notes and many are presently delinquent as reflected by Exhibit "1". In addition, two of the properties (Redlands Blvd.—San Bernardino and Highland—San Bernardino) are in default with Notices of Default and Intent to Sell having been recorded.

During the pendency of the action herein, the court (on Stipulation of the parties) allowed the sales of various parcels of property on the condition that a percentage of the net proceeds be set aside in trust accounts as security for the payment of a judgment that might be rendered.

As of the present time there is $115,344.91 cash on deposit in these trust accounts.

I am willing at the present time to transfer properties with a market value in excess of $2,000,000.00 as security for the payment of the judgment herein (in the event that judgment is affirmed on appeal) for the purpose of obtaining an order staying execution by this Court, which together with the $115,344.91 cash would be more than adequate security in satisfaction of the Judgment.

I am willing to transfer (in some form to be held as security) the properties identified as Plateau Ranch—Angwin (net value $882,900), St. Helena Gates—St.Helena (net value

$490,500) Cold Springs—Angwin (net value $386,360.32) and Trancas Avenue—Napa (net value $313,375) for a total of $2,073,135.32.

Unless this Court stays execution on appeal (by the acceptance of the above real properties and cash currently held in trust accounts) the decision of the Appellate Court may be rendered moot. It is my anticipation that Plaintiff will (if he hasn't already done so) immediately seek the issuance of Writ of Execution, levy upon the real properties which have been liened by Abstracts of Judgment and virtually strip the Judgment Debtors of all of their assets.

In mid-April, 1982, I conferred with my attorney, Mr. HERBERT W. WALKER of DICKENSON, PEATMAN & FOGARTY, and reviewed with him the steps that would necessarily have to be taken in order to stay execution on appeal in the event I was unsuccessful with respect to various post-trial motions. In mid-April of 1982 (based upon the advice of counsel) I spoke to Mr. DON ROCKWELL of Angwin, California, who has acted as my insurance broker for several years. I conveyed to him the information given to me by my attorney and requested that he pursue the obtaining of a committment for the issuance of the bond to stay execution on appeal on behalf of the Judgment Debtors.

I am informed and believe that thereafter Mr. ROCKWELL spoke to Mr. RUSS BARKER (of BARKER, SEMINARA & HOLMAN, insurance brokers, Napa, California) for the purpose of obtaining a corporate surety bond for the purpose of staying execution on appeal.

On May 4 and 5, 1982, I spoke to my attorney and reviewed the requirements for applying for a bond including the supplying of a complete financial statement on behalf of the Judgment Debtors. Thereafter I received my attorney's letter of May 6, 1982, advising me as to the status of obtaining the bonds and requesting that I forward personal financial statements to the brokers for the purpose of their pursuing the application for a stay bond.

During the latter part of May, 1982, I was advised by Mr. ROCKWELL that the various bonding companies (over

twenty of which had been approached by Mr. ROCKWELL, Mr. BARKER and Mr. ASHER) were not able to commit to the issuance of a bond based upon my financial statement since they would require full cash collateral in the face amount of the bond (that is $2,500,000.00 in cash).

Since neither myself nor the other Judgment Debtors have the cash and we are unable to sell or borrow against our real property assets (due to the Lis Pendens recorded by Plaintiff), it became apparent that the obtaining of a bond necessary for the issuance of a stay of execution of appeal would be impossible.

In early June I contacted Mr. MIKE MANN who had been represented to me to be an expert in obtaining bonds and delivered my financial statement for him to pursue the obtaining of a stay bond on my behalf. Thereafter, in approximately mid-June, 1982, I was advised by Mr. MANN that no corporate surety would issue a stay bond without the posting of full cash collateral in the face amount of the bond.

At that time it became apparent that I would be unable to obtain a corporate surety bond and I immediately commenced inquiry of various relatives and friends for the purpose of obtaining individual sureties.

Throughout the latter part of June and during the months of July and August, 1982, I spoke to several relatives, friends and acquaintances, who I knew had substantial net worth for the purpose of obtaining their individual surety agreements to be field with the Court. During the period I spoke to DANIEL HASSO (my first cousin), ALLEN HASSO (my nephew), DR. ROBERT JOHNSON and CARL YARED (close friends) and YAKOB NASHED (a relative), and requested that they consider the execution of a personal or individual surety bonds to be filed with the court in the requisite amount.

All of these individuals advised me that, while they were sympathetic to my position, they were unwilling to execute a bond or surety agreement in the sum required to obtain a stay of execution relative to the Judgment that had been previously entered.

I have exhausted all possibilities of obtaining either a corporate surety bond or individual sureties upon which the trial court could issue its stay of execution.

The only alternative open at this point, to avoid financial ruin to myself, the other corporate Defendants and my family, is to have the Court stay execution upon the transfer of real properties (as security) with a net value sufficient to satisfy the Judgment in the event it is affirmed on appeal.

I declare under penalty of perjury that the foregoing is true and correct this 2nd day of September, 1982, at Napa, California.

/s/ _____

JOHN HASSO

[Trial Exhibit 1]

APPENDIX N

EXCERPT FROM ORDER AND FINDINGS OF FACT OF U.S. BANKRUPTCY COURT

"8. There is also a property in Napa called the ACB Watts Property which defendants' appraiser testified had a value of $1,302,550. Mrs. Hasso, wife of debtor, John Hasso, has encumbered this property by a deed of trust in her favor recorded on January 19, 1982. Her testimony was that she was owed in excess of $1,500,000 which was secured by this property.

* * *

11. The court takes judicial notice of the ruling on the motion for new trial or for judgment notwithstanding verdict in the lawsuit entitled *Duggan v. Hasso*, No. 39856, Superior Court of Napa County, California. In the same proceeding, the court takes judicial notice of the Order Denying Stay of Execution, the court also has considered the declarations of Mr. Hasso filed in both in the Superior Court and in the California Court of Appeals seeking a stay.

* * *

12. *The declaration of Debtor Hasso referred to in paragraph 11 contains various misstatements of fact with respect to properties owned by the debtors and the equity available for the judgment creditor Duggan.*

* * *

DATED: January 17, 1983 /s/

CONLEY S. BROWN
UNITED STATES
BANKRUPTCY JUDGE

[Trial Exhibit 2]

APPENDIX O

EXCERPT FROM OFFICIAL REPORTER'S TRANSCRIPT, TRIAL JUDGE'S COMMENTS AS TO THE HASSO FAMILY "CONSPIRACY" [RT 1357:19 - 1361:10]

MR. JACOBSON: Your Honor, the evidence is—has been compelling so far of—of an extraordinarily unusual relationship between John Hasso, Alan Hasso, and Hebe Hasso, and the way they have dealt with marital property.

THE COURT: Well, and dusty—

MR. JACOBSON: Augusta Maidani.

THE COURT: *The whole thing is, it seems to me a—strongly suggest a familiar—well, for lack of a better word, conspiracy.*

MR. JACOBSON: Yes. And that's precisely my point of view. And I'm going to have more evidence in the case on that very point, and I intend to go to the jury with that very point with regard to the important issue of Mr. Hasso's financial condition for purpose of punitive damages.

But I think that he has not talked with her in 12 or 18 months has little or no probative value on this question of whether there is something strange and unusual going on, and whether this—this attempt to block her deposition testimony is in furtherance of that—of that purpose from Mr. Gulick to say I have no control over her.

She is not a party, and I don't represent he—her. And then to vigorously and forthrightly oppose her deposition on the ground having nothing to do with the form of the notice.

This isn't an objection to form. It's a statement that she is not here and you can't take her deposition. That's the message that I was given.

THE COURT: Yeah, I agree. I think it's—its exactly what you characterize it to be, and I'm going to permit you to introduce this as an authorized admission to—against interest exception to the hearsay rule.

MR. JACOBSON: Thank you, your Honor. And then may I address one more matter before the jury comes in?

What I mentioned yesterday afternoon, and I'm not describing either Mr. Gulick or myself, because we are all human, but may I invite the Court to once again tell the jury—

THE COURT: Well, I will mention—

MR. JACOBSON:—that on objections—and would your Honor be kind enough to supplement your comments by saying that there is an important purpose served by the objections having to do with the reliability and clarity of the evidence that they are given to consider in the case. Because I suspect some of them—the jury don't even understand why objections are being made. We lawyers use technical terms.

THE COURT: I'll try to do that, Mr. Jacobson.

MR. JACOBSON: Thank you, your Honor.

MR. HASSO: And would I be allowed to make a comment or comments you made just a few seconds ago?

THE COURT: I'd rather you only respond to the questions that are asked by counsel.

MR. HASSO: Fine.

THE COURT: Mr. Hasso, just for the record, I'm still—and I note Miss Hasso is present, and she wasn't present earlier, and may be puzzled by my remark about a conspiracy.

The thing—the things that I'm relying on to make that remark are the contention that was made to me last year that the two and a half million dollars belonged to Mrs. Maidani.

The suggestion that—that no continuance should be granted Mr. Jacobson to respond to her motion because she had made a special trip here from Lebanon to be present when the motion was heard, and presumably take the money, if her motion was granted.

And now, my discovery is that, in fact, the money is not hers and never has been hers. She was simply a conduit.

And it was placed in agreement—was placed in her name for reasons that I don't fully value when, in fact, Mr. Hasso was the owner and had control of that money.

Plus the fact that apparently the—there was an issue now pending as to whether anyone has been paying income taxes on the interest. We don't know, really, to whom the money has been going. It's been paid to a bank officer in Southern California.

Franchise tax board has notified the county clerk that nobody has been paying any income taxes on it. County counsel's office has now filed a motion for instructions set for April 19th, to try to sort out what's happened.

Plus this other factor that I've alluded to where it appears that Mr. Hasso, while under the threat of this case, transferred most of is assets and value to his former spouse, keeping only assets without value. All of which seems to me to suggest some miscapitulation going on here between various family members.

Plus this new disclosure that what was an unconditional conveyance of the Watts Property of Alan Hasso is not, in fact, unconditional. And there is some sort of an unwritten, perhaps even unarticulated, moral commitment felt by Alan Hasso to reconvey the property to Hebe Hasso and possibly even John Hasso in exchange, I guess, for payment of the moneys that he loaned.

All of which indicates to me that this is a very close family who circled the wagons apparently when under attack. And that's what I meant when I remembered—

MR. HASSO: Your Honor, it's very simple.

THE COURT: I wasn't implying any criminal criminality. I just think that there is a civil—there seems to be a strong suggestion here a civil pact among them to protect the family's wealth when it's assaulted.

I'm sorry. That's for the record. I don't want to argue about it. That's just my reaction to what I heard in this case so far, and I'm particularly annoyed by Mrs. Maidani's

representations through counsel that that two and a half million dollars was hers and that was apparently the only security that was clearly available for the plaintiff if he prevails or when he prevails in this case.

That money, had I succumbed to her assertions and released it to her, I'm certain would be long gone by now. It would be back in Lebanon. And there would be absolutely no security. The lien on Mr. Jacobson's less pendens that he released and reliance on that bond money being placed would be gone. The judgment lien would be gone.

There being no money judgment by view of the reversal of the court of appeals, and I think Ms. Maidani came very close to perpetrating what was amounted to a fraud in this court.

And I think by implication, John Hasso must have been a party to that because he stood by and allowed her to come into court through counsel and to represent to me that she was the owner of that money, when his testimony in this proceeding has clearly indicated he was the owner of it.

So, that's the basis of my ruling. I'm going to allow 10 into evidence for what limited evidentiary effect it may have. (Emphasis added)

[RT 1357:19 - 1361:10]

APPENDIX P

EXCERPT FROM OFFICIAL REPORTER'S TRANSCRIPT, TRIAL JUDGE'S RULING THAT BOTH PARTIES ARE PRECLUDED FROM INTRODUCING EVIDENCE ON THE BASIC FRAUD [RT 987:17 - 988:27]

THE COURT: Bear in mind, gentlemen, I'm ruling intuitively. I've heard no law on this except for one citation, which didn't sound to me to be really on point. If either of you can be—it's a little late in the game, in middle of opening statements, but I don't like ruling intuitively in a case of this magnitude. I don't see how else we can. What other ground rules we can adopt that don't result in reopening the first trial.

And then I haven't said it, but I think 352 does come into play here. A., I don't think that this is relevant to the issue before us, but even if there is some slight or marginal relevance we get into another four to six weeks of trying the case essentially because we're going to be retrying the first trial. It would seem to me terribly confusing to the jury. It would be confusing enough to me to tell them on the one had there is a fraud determination, then to present them with a whole lot of evidence on—generally from which it will be argued, well, it was just a little fraud. It wasn't a big fraud. It was a mistake. It wasn't a fraud at all. It was based Mr. Hasso's reliance on Mr. Humphreys. And he really thought he was acting properly in doing so. So maybe that really there wasn't any fraud at all. I don't see where else that line of reasoning is going to go.

So I think it's irrelevant. I think it's barred by the law of the case res judicata. And I think that 352 does come into play, if it's even slightly relevant. And I think the trick is going to be trying to keep the two of you on some kind of an even keel so that Mr. Jacobson can't go back and dredge up things that—to increase the reprehensibility. That, frankly, what sounds like his theory of the case is that there's been a

lot of conduct since the judgment from which it could be argued that there has been a compounding of the original reprehensibility. I don't think he needs to go back. If the jury finds that all of these machinations and so forth have occurred and feels that it was done simply to compound the original secret intent to defraud Mr. Duggan of his profit, I think he's got plenty to argue. (Emphasis added)

[RT 987:17 - 988:27]

APPENDIX Q

EXCERPT FROM OFFICIAL REPORTER'S TRANSCRIPT, REFUSAL OF TRIAL JUDGE TO RULE *IN LIMINE* ON ADMISSIBILITY OF SO-CALLED MITIGATING EVIDENCE [RT 855:21 - 856:21]

THE COURT: I just—I think we're frankly reaching a point of diminishing returns. We can argue this generally forever. Until there are specific issues before me I'm just not in a position I don't think to rule.

And I may make the case more cumbersome. It may necessitate interrupting and sending the jury out and so forth so that I can hear argument and sobeit. I hope we don't have to do too much of that because it's awkward for everybody, and I'll do what I can to try to minimize it.

Maybe when I get into a specific area I can focus on the specifics and give you a ruling, then that will, you know, give you some guidance for at least the next several questions, if not so we don't have to do it just on a question by question basis.

But the only givens here are those that are set forth in the statement of facts that I read to the jury. How we're going to wrestle with that and what efforts Mr. Hasso is going to make to present himself in a better light this time than he did the last time, I don't know and I'm not sure you know. You may have your suspicions and want me to rule in limine that he can't do it, but I don't think I can make that kind of in limine motion.

MR. JACOBSON: I accept your Honor's statement.

THE COURT: I agree with you any effort to get on the stand now and to relitigate the issue of fraud I would probably sustain an objection. What efforts he's going to make to present himself, however, in a better light given that adverse determination I don't know. I can't predict him and I'm unwilling to rule in advance of them.

[RT 855:21 - 856:21]

APPENDIX R

COURT OF APPEAL OPINION SIGNATURE PAGE

_____

Perley, J.

We concur:

_____

Anderson, P.J.

_____

Channell, J.

(Duggan v. Hasso, A042843)

No. 89-1796

In The

Supreme Court of the United States

October Term, 1989

JOHN HASSO, ELISSA N.V., RUMBA, N.V., PACIFIC MIDLAND, N.V., KONDOLAND CORP. AND GRAPE CAPITAL CORP.,

Petitioners,

v.

CHARLES DUGGAN,

Respondent.

On Petition For Writ of Certiorari to the Court of Appeals of the State of California

PETITIONER'S REPLY BRIEF

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REPLY STATEMENT OF REASONS FOR GRANTING HASSO'S PETITION

Respondent's cursory discussion of *Pacific Mutual* implicitly acknowledges the Court's unique opportunity, if it grants review in this case, to treat comprehensively the due process issues involved in state court proceedings for the award of punitive damages. This Court should take advantage of the opportunity to review this case in conjunction with *Pacific Mutual.*

The trial court's evidentiary rulings deprived Hasso of the ability to defend himself on the issue of reprehensibility and thus denied him due process. Respondent's opposition also concedes that the punitive damage award was based on Hasso's attempts to defend himself. The issues were adequately raised and the case presents a clear record for consideration of the Due Process Clause questions.

I. THE TRIAL COURT'S EVIDENTIARY RULINGS DEPRIVED HASSO OF HIS DUE PROCESS RIGHTS

Respondent's argument that the trial court merely applied rules of evidence in excluding all of Hasso's mitigating evidence misses the point of the due process issues. The evidentiary rulings violated due process as they barred Hasso from defining the degree of the fraud for the jury even though the degree of the fraud – Hasso's "reprehensibility" – was the central issue at the trial.[1]

---

[1] Evidentiary rulings can, of course, amount to a violation of due process. *See, e.g., McGuire v. Estelle,* 1990 U.S. App. LEXIS 6995 (9th Cir. 1990).

A. Res Judicata Rules Cannot Supersede Due Process Rights.

Common law rules of *res judicata* cannot control the conduct of a trial where they conflict with a defendant's due process rights. The assertion of *res judicata* to exclude evidence of the circumstances of the fraud barred Hasso from defending himself on the key issue. This denied him due process. *Bell v. Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591 (1971).

Moreover, *res judicata* was not a proper basis for excluding mitigating evidence in this case. Hasso never contended that the jury could ignore the judgment of liability, and the jury was instructed that Hasso committed fraud. The trial was about punishment, not liability.

Respondent notes (p. 8, fn. 5) that Judge Champlin was concerned that Hasso wanted to put in evidence that "it was just a little fraud," and that this would confuse the jury. Of course, the precise question the jury was asked to answer in determining the "reprehensibility" of Hasso's conduct was whether the fraud "was just a little fraud." Speculation that the jury might be confused cannot override Hasso's right to defend himself.

B. Relevance Determinations Are Not Immune To Due Process Scrutiny.

Respondent's statement (p. 2) that the evidence Hasso offered was found not to mitigate Hasso's conduct confuses relevance with burden of proof. The jury in the 1982 trial did not think defendants' evidence sufficient to

defeat plaintiff's burden of proof as to liability. But punishment, not liability, was the issue for the jury in the second trial and plaintiff carried a separate burden of proof as to reprehensibility.

Even in criminal cases the sentencer is required to consider extenuating evidence. The evidence does not permit it to overturn the guilty verdict; yet, it does permit the sentencer to consider a lesser punishment. The jury in this case, for example, might have concluded that Hasso had mixed intentions when he entered the deal and reneged only because Duggan's subsequent conduct made the deal far less attractive. This is far different from a conclusion that Hasso from the start had the sole intent to defraud Duggan and manipulated events thereafter with only fraud in mind. Each of these two scenarios might support a finding of fraud, but they support different conclusions about the reprehensibility of the conduct and the punishment deserved.[2] Because reprehensibility was at issue, and because all frauds are *not* equal, the evidence Hasso offered was relevant and he had a due process right to present it to the jury.

---

[2] Respondent's allegation (p. 11, fn. 9) that Hasso misstated the trial court's view of the fraud issue is incorrect. The trial court stated at the end of the first trial:

> *I don't think the evidence is there to show that he entered into this agreement with an intent at the beginning to defraud plaintiff. I think they just had the typical kind of falling out that frequently happens to joint ventures.* [RT (first trial) 1524-25 (emphasis added). *See* AOB 66.]

In concluding later that sufficient evidence supported the fraud verdict, the trial court must have had in mind the first scenario above, not the second.

C. Convenience Cannot Outweigh Hasso's Due Process Rights.

Because the mitigating evidence Hasso offered was relevant, the conclusions based on California Evidence Code section 352 were also incorrect. Exclusion of evidence based on administrative convenience cannot outweigh the due process right to defend oneself, particularly where the evidence goes to the heart of the criteria by which punitive damages will be assessed.

II. RESPONDENT CONCEDES THAT THE PUNITIVE DAMAGE AWARD WAS BASED ON POST-TRIAL LITIGATION CONDUCT UNRELATED TO THE FRAUD AT ISSUE

Respondent concedes that Hasso's attempts to stay execution of the judgment pending appeal and to defend himself served as the principal bases for the punitive damage award. (*See* Opposition at pp. 7, 11-12, 26-27.) There is thus no doubt that Hasso was required to pay millions of dollars to plaintiff based on his assertion of rights to a proceeding free of prejudicial error and based on alleged "deceits" with which he was never charged and against which he did not have a fair opportunity to defend.[3] The case therefore presents a clear record for the Court to pass on the Due Process Clause questions presented.

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[3] The appropriate remedies in any case for alleged litigation abuses are court sanctions or a separate action raising abuse of process or other tort claims.

III. THIS COURT CAN AND SHOULD CONSIDER HASSO'S FEDERAL DUE PROCESS QUESTIONS

This Court is empowered to review constitutional questions in its discretion. No jurisdictional bar limits review of important questions, only prudential concerns. *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79, 108 S.Ct. 1645 (1988). This Court has not hesitated to review due process questions in particular when the constitutional error is clear and substantial. *See, e.g., Wood v. Georgia*, 450 U.S. 261, 265 n. 5, 101 S.Ct. 1097, 1100 n. 5 (1989). The Court should not hesitate to review the important due process issues in this case.

A. The Due Process Right To Present Mitigating Evidence Was Adequately Raised Below.

Although Hasso did not mention "due process" in arguing that he should be permitted to introduce mitigating evidence, the trial court made it clear that it understood that the issue was Hasso's right to present a defense to the punitive damages claim. [RT 853:17-22.] Hasso further argued in the motion for new trial that he should be allowed to introduce mitigating evidence because he had a due process right to defend himself. There he stated that the court "violated fundamental due process" in excluding the evidence. [CT 1109:8-14.]

Hasso also raised this due process issue in Appellant's Opening Brief. He argued that the exclusion of evidence of the circumstances surrounding the fraud "effectively deprived defendant of a fair trial on punitive damages." [AOB 41.]

This Court does not require that a petitioner have cited in the trial court to the specific Constitutional provision relied upon to obtain review if the constitutional issue was otherwise adequately raised. In *Taylor v. Illinois*, 484 U.S. 400, 407 n.9, 108 S.Ct. 646, 651 n.9 (1988), for example, petitioner, as in this case, did not cite to the Sixth Amendment until his petition for rehearing in the court of appeal. The Court noted that petitioner had made a generalized objection in the court of appeal based on "due process" which the Court took as a constitutional objection. *Id.* Petitioner had also cited to cases which relied in part on Sixth Amendment arguments. *Id.* The Court held that under these circumstances the issue was sufficiently well presented to support its jurisdiction. *Id.*

The right to defend oneself derives from due process standards. This is not a case like *Taylor* where the specific constitutional source for right asserted was unclear. The trial court recognized that the issue was Hasso's right to defend himself. The due process issue therefore was before the trial court and the Court of Appeal.

B. The Due Process Right Not To Be Punished For Exercising The Right To Defend Oneself Was Adequately Raised Below.

Hasso argued to the trial court and on appeal that admission of evidence of litigation conduct deprived him of his right to defend himself, citing cases which relied on fundamental principles of due process. This case therefore falls squarely within *Taylor v. Illinois*, where the Court found it significant that cases cited on appeal set

forth the precise constitutional provision relied on in the petition for certiorari. Review is therefore appropriate.

In the motion for new trial, Hasso argued that the admission of evidence regarding post-trial litigation conduct denied him his fundamental right to defend himself. He cited the court to *Palmer v. Ted Stevens Honda, Inc.*, 193 Cal.App.3d 530, 238 Cal.Rptr. 363 (1987), holding that evidence of a defendant's litigation tactics was inadmissible to prove bad faith. [CT 1339-1354.] *Palmer* concluded that introducing such evidence deprived a defendant of his fundamental right to defend himself. 193 Cal.App.3d at 539, 238 Cal.Rptr. at 368.

Hasso stated also in Appellant's Opening Brief that admitting the evidence of litigation conduct "violated settled law protecting a litigant's right to defend himself . . . " and cited *Palmer* and other cases based on "considerations of fundamental fairness and the right to a vigorous defense." [AOB 45, 47.]

Hasso also cited *In re Marriage of Flaherty*, 31 Cal.3d 637, 183 Cal.Rptr. 508 (1982), in which the California Supreme Court defined standards for imposing sanctions for filing a frivolous appeal. The court expressed its concern that standards not chill litigants' rights to pursue redress on appeal and that they be precise enough to afford litigants notice and an opportunity to respond to charges. *Id.* at 650, 651, 183 Cal.Rptr. at 516-517. In support, the court cited United States Supreme Court cases affirming a litigant's rights under the Due Process Clause to notice and an opportunity to defend against charges. Thus, as in *Taylor*, the due process issue was adequately raised through citation to relevant cases.

Hasso's failure to object to some of the evidence of litigation conduct at trial does not preclude review. The trial court made it clear during opening statements that any such objection would be futile. The court stated that all evidence concerning the appeal and the efforts to stay execution of the judgment pending appeal *would be the focus of the trial*:

> I think where this battle lies this time around is what's happened since the judgment. *You have a spector [sic] of Mr. Hasso using essentially Mr. Duggan's money to stay the execution of a judgment.* [RT 989:1-4 emphasis added.]

Under California law, objections are not required where they would have been futile. *See People v. Brooks*, 88 Cal.App.3d 180, 166, 151 Cal.Rptr. 606, 609 (1979). This Court, moreover, even where the state court found that a failure to object precluded review, has determined that the objection would have been futile and found that the question was sufficiently preserved. *See Douglas v. Alabama*, 380 U.S. 415, 422, 85 S.Ct. 1074, 1078 (1965).[4]

---

[4] The California Supreme Court denied review without comment. Thus, it is not true (Opposition, p. 6) that they did so on the grounds that the issues were not adequately presented below. In any case, this Court's jurisdiction to review the Due Process Clause issues is not constrained by state court limits on review of issues not adequately raised in the trial court. Even assuming that the Court of Appeal's denial of the petition for rehearing without comment, and the California Supreme Court's denial of review without comment, were "silent application[s] of a procedural bar," *Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 2426-27 (1982), such a state procedural bar does not preclude Supreme Court review where the bar is not " 'strictly or regularly followed.' " *Id.* at 263, 102 S.Ct. at 2426.

(Continued on following page)

C. The Due Process Right To Be Free Of Arbitrary Punitive Damage Awards That Bear No Relation To An Amount Necessary To Punish And Deter Is Reviewable In Connection With Pacific Mutual.

Hasso did not raise this issues below in due process terms; however, under the circumstances here this Court can and should consider the due process question presented.[5] First, the factual record is complete on this issue. Making the arguments specifically in due process terms would not have altered the factual record. It is a matter

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(Continued from previous page)

California appellate courts may, in their discretion, review questions, including constitutional questions, not raised in the trial court. *Canaan v. Abdelnour*, 40 Cal.3d 703, 722 n.17, 221 Cal.Rptr. 468, 480 n.17 (1985). The rule applies in cases in which the issue was not raised at all by the appellate briefs. *See id.* (issue raised for the first time in oral argument before the California Supreme Court); *Wilson v. Lewis*, 106 Cal.App.3d 802, 805, 165 Cal.Rptr. 396, 398 (1980) (issue raised by appellate court on its own motion). Thus, even assuming *arguendo* that the constitutional issues were not raised in the trial court, and that the denial of the petitions for rehearing and review were based on such failure, this Court nonetheless has jurisdiction to review Hasso's Due Process Clause questions.

[5] Respondent misreads *Browning-Ferris Industries v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989), on the reviewability of proportionality standards. There petitioner, after the Court had already refused to consider proportionality standards under the Due Process Clause, asked the court to craft federal common law standards of proportionality. The Court concluded that, apart from the due process issues which it would not consider, proportionality was a state law issue. *Id.* at 2921-22. The Court did not preclude consideration of proportionality in the context of due process standards.

only of application of due process standards to the amount of punitive damages awarded in relation to (1) the amount of compensatory damages and (2) the amount of Hasso's net worth. Thus, this is not a case where making the constitutional argument would have required additional facts and analysis not found in the record. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 221, 103 S.Ct. 2317, 2323 (1983).

Second, this Court has granted certiorari in *Pacific Mutual* apparently to consider identical issues. Any standards established in that case will apply to all future California punitive damages cases; thus *Pacific Mutual* renders moot any need to allow the state court to fashion its own remedies. *See id.*

IV. CONCLUSION

This Court should grant the petition for certiorari for consideration in conjunction with *Pacific Mutual.*

Respectfully submitted,

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